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## Indigenous Peoples and Globalization: From “Development Aggression” to “Self-Determined Development”

### I. INTRODUCTION

In June 2009, in what had been referred to as the “Amazon’s Tiananmen”,<sup>1</sup> armed police engaged in a bloody conflict with what had been a peaceful indigenous protest in Bagua, northern Peru. Several people were shot dead, and at least 200 injured.<sup>2</sup> The protest was against the granting of concessions for the exploration and exploitation of gas, oil and gold to transnational companies in the Amazon region. The concerned communities protested against the adoption of national decrees allowing these concessions on indigenous territories as elements of a free trade agreement with the United States of America. These events in Bagua constitute one of the most recent and widely publicized confrontations in a series of similar and ongoing conflicts between indigenous communities and governments and/or corporations over exploitation of natural resources in their territories in countries throughout the world.<sup>3</sup>

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1 See Guy Adams, “Peru Accused of Cover-Up after Indigenous Protest Ends in Death at Devil’s Bend”, *The Independent*, 19 June 2009.

2 Exact figures are still unclear and controversial with the government claiming that 32 people were killed in the incident while human rights lawyers and news reports put the number of confirmed deaths at closer to 60, and say hundreds are still missing, at <<http://www.hrw.org/en/news/2009/06/10/peru-investigate-violence-bagua>>.

3 Complaints to the UN Human Rights Treaty Bodies, to the International Labour Organization (ILO), the Organization for Economic Cooperation and Development (OECD) and other international and regional mechanisms as well as national ombudsmen and national human rights institutions are all indicative of this trend. See for example cases currently under consideration by these bodies in relation to hydroelectric and extractive projects on indigenous peoples’ lands in Brazil, Canada, the Philippines, Peru, India, Columbia and Ecuador. See Early Warning Urgent Action procedures case of Committee on the Elimination of Racial Discrimination (Brazil, Canada, the Philippines, Peru

This emerging pattern of conflicts in indigenous territories is indicative of three interrelated trends: first, indigenous peoples are increasingly the victims of systematic abuse associated with imposed forms of economical development; second, indigenous peoples are organizing at the global, regional, national and local levels to resist these externally imposed development models; third, these models of development and the process by which they are imposed on indigenous peoples are a function of the manner in which economic globalization is managed and controlled. Jerry Mander, an academic who has worked on the topic of indigenous peoples and globalization, touched on these trends when he noted: “[n]o communities of peoples on this earth have been more negatively impacted by the current global economic system than the world’s remaining 350 million indigenous peoples. And no peoples are so strenuously and, lately, successfully resisting these invasions and inroads.”<sup>4</sup>

There are as many definitions of globalization as there are strongly held positions on it. Economic Nobel Prize winner, Joseph Stiglitz, observed “the differences in views are so great that one wonders, are the protestors and policy makers talking about the same phenomena”?<sup>5</sup> For some it represents the solution to world poverty, facilitating flows of resources and levelling the economic playing field for all; for others it is the latest means to maintain unequal power balances that serve to ferment the growing divide between rich and poor.<sup>6</sup> Indeed there is no consensus on when globalization commenced. Many argue that since the emergence of mankind some form of globalization has been taking place.<sup>7</sup> Others point to its origin in the emergence of states and the establishment of the law of nations “as a framework for managing the globalizing of power and trade” and associated conflicts that erupted between colonial powers.<sup>8</sup> For the purposes of this article globalization, in its current manifestation, is taken to refer to the emergence of a globalized commercial market premised on the free movement of capital and increasing levels of consumerism with reductions on controls in relation to the movement of goods while simultaneously maintaining a highly

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and India), at <<http://www2.ohchr.org/english/bodies/cerd/early-warning.htm>>; OECD complaints (India and the Philippines), at <[http://oecdwatch.org/cases/Case\\_165](http://oecdwatch.org/cases/Case_165)> and <[http://oecdwatch.org/cases/Case\\_164/?searchterm=mindoro](http://oecdwatch.org/cases/Case_164/?searchterm=mindoro)>; and ILO representations alleging non-observance of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), (Columbia and Ecuador), at <<http://www.ilo.org/ilolex/english/iloquery.htm>>.

- 4 Jerry Mander and Victoria Tauli-Corpuz (eds.), *Paradigm Wars: Indigenous Peoples' Resistance to Globalization* (Sierra Club Books, San Francisco, 2006), 3.
- 5 See Joseph Stiglitz, *Globalization and its Discontents* (Penguin Politics, New York, 2002), 9.
- 6 For a discussion on the concept of globalization see Thomas Hylland Eriksen, *Globalization* (Berg Publishers, Oxford, 2007); see also Jurgen Osterhammel and Niels P. Petersson, *Globalization: A Short History* (Princeton University Press, New Jersey, 2009); and David Kinley, *Civilising Globalisation Human Rights and the Global Economy* (Cambridge University Press, Cambridge, 2009).
- 7 See Robert O. Keohane and Joseph S. Nye Jr., “Globalization: What’s New? What’s Not? (And So What?)”, 118 *Foreign Policy* (2000), 104-119.
- 8 Erica Irene A. Daes, *Indigenous Peoples Keepers of Our Past—Custodians of Our Future* (IWGIA, Copenhagen, 2008), 78.

restricted movement of labour. The model of globalization emerged immediately after the end of the Cold War and is a function of a hegemonic capitalist global economy and the associated expansion in the sphere of influence and activities of transnational or multinational corporations. Associated with the free and largely unregulated movement of capital is the potential for speculation on a scale greater than the total value of goods traded in the global economy.<sup>9</sup> The objective and outcome of this speculation is not necessarily to increase general living standards or productivity but rather to maximize individual financial gains.<sup>10</sup> As recent experience has shown in the context of the global financial crisis, this speculation has the potential to destabilize the entire global economy.

The existence of many of the world's indigenous peoples can be attributed to their resistance to prior waves of globalization. Their territories and cultures remain the final and most sought-after frontier in its latest expansion and their resistance its final obstacle. They stand, both physically and ideologically, at the frontlines of the struggle to transform the globalization model.<sup>11</sup> If unsuccessful, they stand to be the most profoundly impacted by it. For many, the threats it poses to their cultures and territories puts their very existence as a people at stake. As with previous waves of globalization that occurred during the colonial era, the current model of economic globalization is based on the exploitation of natural resources predominantly located in indigenous territories. What differentiates this latest phase of economic globalization from phases past is the rate at which it is occurring and the geographic and physical extent of its impacts. Unprecedented demands for the world's remaining resources including oil, gas, minerals, forests, freshwaters and arable lands, combined with new technological methods of harvesting what were, in many cases, hitherto inaccessible resources, and speculation on the future value of these resources have created a new development

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9 Jose Luis Sampedro, *El Mercado y la globalizacion* (Mateu Cromo Artes Graficas, SA, Madrid, 2002), 59: "Esa libertad financiera es decisiva para el sistema, pues fomenta sus operaciones especulativas por cuantias muy superiores al valor total del las mercancías intercambiadas mundialmente".

10 *Ibid.*

11 Ideologically many indigenous peoples are opposed to the principles of consumerism which are embodied in globalization. As noted by Daes: "In many ways, indigenous peoples challenge the fundamental assumptions of globalization. They do not accept the assumption that humanity will benefit from the construction of a world culture of consumerism." Daes, *op.cit.* note 8, at 75. In many indigenous communities throughout the world, the only effective means that is available to prevent the territorial expansion of development projects driven by globalization is the use of physical barricades. Examples of this in indigenous communities in countries including India, the Philippines, Peru, Ecuador, Russia, New Caledonia, Canada and Guatemala were presented at the International Conference on Extractive Industries and Indigenous Peoples, 23-25 March 2009, Legend Villas, Metro Manila, Philippines (presentations on file with the authors). See also Shin Imai, "Indigenous Self-Determination and the State", in Benjamin J. Richardson, Shin Imai and Kent McNeil (eds.), *Indigenous Peoples and the Law* (Hart Publishing, Oxford, 2009), 285.

paradigm in which even the remotest and most isolated indigenous community in the world cannot avoid globalization's extended reach.<sup>12</sup>

One of the key concepts associated with this recent form of economic globalization is the notion of development. Economic globalization with its quest for natural resources has been facilitated by development policies and associated trade and investment agreements implemented at the national and international level. Development has become the mantra and justification of the current globalization phenomena, if not its heart.<sup>13</sup> As with the concept of 'globalization', 'development' has many layers of meaning, with the battle over its definition in many ways reflecting the battle of interests that are at stake in its realization.<sup>14</sup> The evolution of these definitions, which have

- 12 Large scale projects such as those in the extractive and hydroelectric sectors have disproportionate impacts on indigenous peoples. Given that much of the world's remaining mineral resources are located in indigenous territories and that many of the world's major dams continue to be built in indigenous territories this trend looks set to continue in the future. See Roger Moody, *Rocks and Hard Places* (Zed Books, London, 2007), 10; and Antonio A. Tujan Jr. and Rosaria Bella Guzman, *Globalizing Philippine Mining* (IBON Foundation Databank and Research Centre, IBON Books, Manila, 2002), 153. See also World Commission on Dams, *Dams and Development: A New Framework for Decision Making* (The World Commission on Dams) (Earthscan Publications, London, 2001), 110-112. For case studies addressing the impacts of globalization on indigenous peoples see Emily Caruso and Marcus Colchester (eds.), *Extracting Promises: Indigenous Peoples, Extractive Industries and the World Bank* (Tebtebba Foundation, Manila, 2005); and Geoff Evans, James Goodman and Nina Lansbury (eds.), *Moving Mountains Communities Confront Mining and Globalization* (London, Zed Books, 2002).
- 13 For a general view on the relationship between development and globalisation see: Leslie Sklair, *Globalization: Capitalism and its Alternative* (Oxford University Press, Oxford, 3rd ed., 2002).
- 14 The traditional definition of development which originated in Western Europe viewed development as primarily a macroeconomic phenomenon. Development was generally regarded as a linear process consisting of the transformation of a society as a result of "economic liberalism and scientific and technological progress, the latter being regarded as its systematic application and most remarkable product" (UNESCO 1995). This model of development was given new impetus following World War II in what has been described as the "age of development". Wolfgang Sachs, *The Development Dictionary: A Guide to Knowledge as Power* (Witwatersrand University Press, Johannesburg, 1993). The cultural dimension of development has come to the fore in recent decades. This has been the result of a reconceptualization of development through the use of anthropological, sociological and political science perspectives, methodologies and models. This new conception of development sees culture as constituting "a fundamental dimension of the development process" and the "aim of genuine development [being] the continuing well-being and fulfilment of each and every individual" (Mexico City Declaration 1982). However, transmitting this conception of development from theory into practice has been slow as a result of a lack of political will on the part of States and conflicts with their economic and political strategies. UNESCO, *The Cultural Dimension of Development Towards a Practical Approach* (UNESCO Publishing, Paris 1995), 20. See also UNESCO, Mexico City Declaration on Cultural Policies World Conference on Cultural Policies Mexico City, 26 July-6 August 1982. For an overview of the evolution of the concept of development see Timmons Roberts and Amy Hite, *From Modernization to Globalization*

addressed the determination of whom development empowers and what outcomes it generates, and their implications for indigenous peoples, are the subject of this article.

The article seeks to examine indigenous peoples' issues and aspirations associated with globalization and development. It will trace concepts of development that range from a rights-violating process and concept, referred to by indigenous peoples as "development aggression", to a rights-driven and enabling concept which indigenous peoples are increasingly referring to as "self-determined development". Since their active engagement with international mechanisms commenced in the 1970s, indigenous peoples have sought to achieve their aspirations and address their issues through engagement with the human rights debate. Premising their entitlements as indigenous peoples on their self-determination and land rights, indigenous peoples are attempting to make use of the international legal framework as a means to challenge the undesirable impacts of globalization and transform 'development' into a process that is compatible with their right to self-determination.<sup>15</sup> The article will argue that self-determined development can be operationalized through a culturally sensitive human rights-based approach to development which is premised on obtaining indigenous peoples free prior informed consent, acknowledging their ownership rights to lands and resources, and respecting their right to self-determination. It approaches these issues from the perspective of individuals engaged with indigenous peoples attempting to assert their rights in the context of large-scale development projects on their land. Its aim is to stimulate further discussion and debate in relation to the concept of self-determined development and the manner in which it can be operationalized.<sup>16</sup>

## II. FROM "DEVELOPMENT AGGRESSION" TO SUSTAINABLE AND HUMAN DEVELOPMENT

The popular conception of development associates it with achieving positive outcomes or ends, primarily in relation to improved living conditions and reductions in poverty

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*Perspectives on Development and Social Change* (Blackwell Publishing, Oxford, 2000). See also John Martinussen, *Society, State and Market: A Guide to Competing Theories of Development* (Zed Books, New York, 1997). For a critical analysis of the development discourse and its conceptual foundations see Sachs, *op.cit.* note 14.

- 15 See *Indigenous Peoples and United Nations Human Rights Treaty Bodies: A Compilation of UN Treaty Body Jurisprudence and the Recommendations of the Human Rights Council 2007-2008*, Volumes III (Forest Peoples Programme, Moreton-in-Marsh, 2009); *Indigenous Peoples and United Nations Human Rights Treaty Bodies: A Compilation of UN Treaty Body Jurisprudence 2005-2006*, Volume II (Forest Peoples Programme, Moreton-in-Marsh, 2005); and *Indigenous Peoples and United Nations Human Rights Treaty Bodies: A Compilation of UN Treaty Body Jurisprudence 1993-2004*, Volume I (Forest Peoples Programme, Moreton-in-Marsh, 2005).
- 16 Many of the examples used in the article are taken from the experiences of indigenous communities in the Philippines where the authors have assisted them in bringing issues regarding extractive industry operations in their lands to the attention of international human rights mechanisms. These experiences are considered relevant for indigenous peoples in other states in light of the fact that the Philippines 1997 Indigenous Peoples Rights Act (IPRA) was modelled on the then draft UN DRIP.



levels. In the history of mankind this conception of development has served as an important and influential ideology, with some arguing that today it has even reached the level of a “global faith”.<sup>17</sup> How these development ends are defined and measured and the means by which they are, or can be, achieved is however the subject of intense debate. In his book, *Development as Freedom*, Amartya Sen refers to two general visions of the process of development. The first, which he describes as ‘the hard knocks attitude’, sees development as something that requires great sacrifices, including at times denying people enjoyment of their civil and political rights. Sen then contrasts this approach to development with what he refers to as a “friendly” development process, premised on some principles advocated by Adam Smith and further developed by Sen himself in his conception of development as a “process that expands real freedoms that people enjoy”.<sup>18</sup> This latter and other “friendly” development discourses will be addressed in the next section. The final section of the article will address the issue of self-determined development. As a brief introduction to this important and evolving concept it is interesting to note that the Oxford Dictionary defines development as “a gradual unfolding”, evolution, growth from within.<sup>19</sup> In defining “economy” it refers to Adam Smith’s conception of political economy (as opposed to household economy) as “the art of managing the resources of a people and of its government”. Viewed from this perspective the concept of “economic development” implies that a people should manage their own resources in a manner that gradually unfolds, or evolves, from within their own governing structures. This notion is embodied in and consistent with indigenous peoples’ concept of a right to self-determined development.

#### A. Development and Aggression

The latest process of economic globalization driven by powerful states, transnational corporations and international financial institutions has been greatly influenced by the first conception of the development process noted above. The ends associated with this process, and the indicators for determining its success, have frequently been increases in national economic growth and individual income levels. Closely linked to this manner of measuring development ends is the notion of “trickle-down economics”.<sup>20</sup> This term

17 Gilbert Rist, *The History of Development: From Western Origins to Global Faith* (Zed Books, London, 3rd ed., 2009), 21-24.

18 Amartya Sen, *Development as Freedom* (Oxford University Press, Oxford, 1999), 36.

19 This point is also raised by Alastair McIntosh in discussing a Scottish highlands communities’ right to decide its own development priorities. He notes that: “The etymology of ‘development’ derives from de—(to undo) and the Old French, ‘voloper’—to envelop, as in our word, ‘envelope’. To develop is therefore ‘to unfold, unroll to unfurl.’ The biological application, as in ‘foetal development’, accurately captures correct usage. Accordingly, ‘development’ is ‘a gradual unfolding; a fuller working out of the details of anything; growth from within’ (OED).” Alastair McIntosh, *Soil and Soul: People versus Corporate Power* (Aurum Press, London, 2001), 151.

20 For an economist perspective advocating ‘trickle-down economics’ see Philippe Aghion and Patrick Bolton, “A Theory of Trickle-Down Growth and Development”, 64(2) *Review of Economic Studies* (1997), 151-172. For a more sceptical perspective on the concept of ‘trickle down economics’ see Joseph Stiglitz, *Globalization and its Discontents* (Penguin

describes policies popularized during the Reagan era. These policies were premised on reduction of tax rates for businesses and wealthy individuals with the objective of increasing investment levels. Indigenous peoples have frequently been the "sacrificial lambs" in enabling states to achieve these investment objectives. Encouraging investments in the exploitation of natural resources became a common policy of developing countries in achieving their narrowly-defined development ends. As a disproportionate percentage of these resources are located in indigenous peoples' territories the continued abrogation of their rights was seen as a necessary evil if these development ends were to be achieved. For indigenous peoples globally, the term development therefore often equated to dispossession of their lands and resources, increased deprivation and destruction and loss of traditional livelihoods. These outcomes of a rights-denying developmental process that was imposed on them gave rise to what indigenous peoples refer to as "development aggression".<sup>21</sup>

For indigenous peoples development has come to be equated with aggression for three principal reasons. These can be classified as 'the three Ps':

- 1) Philosophies and perspectives that ignore their world views and visions;
- 2) Process and policies imposed on them without meaningful consultation and in the absence of consent;
- 3) Pervasiveness and profoundness of impacts that result from these.

#### 1. Philosophy

The failure to acknowledge and respect indigenous peoples' world views and visions is at the root of development aggression. Indigenous philosophies of development stand in stark contrast to the philosophy underpinning economic globalization. Ideologically, under the dominant model of economic globalization, development has become synonymous with catching up with the most industrialized 'developed' countries. The underlying assumption that development means that all members of a society wish to emulate the economic model and practice of these countries is highly arrogant and extremely detrimental, ultimately fatal, to indigenous peoples' own forms of traditional economy and practices, and indeed to their very existence. This interpretation of development is premised on the idea that traditional economies and ways of life, such as nomadic hunter-gathering or subsistence farming, are outdated forms of development, which should give way to more 'advanced' industrialized approaches to development. The economic and social systems developed and practised by indigenous peoples for centuries are obstacles to development and are categorized as 'primitive' and outdated. This philosophy underpinned and was used to justify the colonial enterprise, especially during the new imperialist period (1880-1914). One of the primary goals of colonization was to gain control over the African continent's rich natural resources. Agreements between the colonial powers in the 1885 Berlin Conference saw the division of the African continent between them in a manner designed to facilitate this. The necessary moral vindication for their actions came in the form of an equation

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Politics, New York, 2002), 78, where Stiglitz states that "trickle down economic was never much more than just a belief, an article of faith".

21 Report of the UN Special Rapporteur, Rodolfo Stavenhagen, Mission to the Philippines, UN Doc. E/CN.4/2003/90, Add. 3, para. 30.



known as 'the three Cs' in which 'commerce plus Christianity equals civilization'. Notably absent from this trilogy were indigenous peoples' philosophies, world views and practices. Instead they were seen as backward peoples who needed to be 'enlightened' by civilization, with commerce being the tool to achieve this. The signing of protectorate treaties with local chiefs served as justification for colonial possession of their lands. For many indigenous peoples little, apart from the language, has changed in the intervening century. The term 'civilization' has been replaced by 'development' as justification for appropriating their lands and resources with devastating impacts to their cultures.<sup>22</sup> Colonization has been internalized, protectorate treaties with colonial states have been replaced by 'agreements' with transnational corporate entities which are facilitated by the new post-colonial states. The outcome is the same: indigenous philosophies continue to be subordinated to externally imposed 'superior' ones, this time in the name of development. As pointed out by the then UN Special Rapporteur on land rights for indigenous peoples, Madame Erica Deas,

[t]he legacy of colonialism is probably most acute in the area of expropriation of indigenous lands, territories and resources for national economic and development interests. In every part of the globe, indigenous peoples are being impeded from proceedings with their own forms of development consistent with their own values, perspectives and interests.<sup>23</sup>

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- 22 The emergence of this trend whereby the colonial concept of civilization was replaced by the more acceptable notion of development is evident in Art. 22 of the Covenant of the League of Nations. It states, in the context of the post war decolonization:

[...] to those colonies and territories, which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation [...] The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations [...] as Mandatories on behalf of the League. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances [...] peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory [...] and will also secure equal opportunities for the trade and commerce of other Members of the League. The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

The post-World War II inaugural speech by President Truman, echoed some of these sentiments when he announced "a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas. The old imperialism—exploitation for foreign profit—has no place in our plans. What we envisage is a program of development based on the concepts of democratic fair dealing. See Sachs, *op.cit.* note 14, 6.

- 23 Preliminary working paper prepared by Erica-Irene Daes, Special Rapporteur, Indigenous People and their Relationship to Land, E/CN.4/Sub.2/1997/17, 49

## 2. Process

From the perspectives of indigenous peoples the noble objectives of development as a means of poverty reduction and improved wellbeing have been hijacked by individuals, corporate entities and states that have vested interests in exploiting resources in their territories. In many states where indigenous peoples live, industry and powerful political elites are perceived as having colluded to establish regulatory frameworks in which denial of indigenous rights to their lands and resources are systematized. The term “regulatory capture” has been coined to describe this process whereby legislators have effectively become stenographers for industry.<sup>24</sup> This is particularly the case in the context of natural resource exploitation where states have declared mining to be in the national or public interest, in the absence of sound economic models proving this to be the case and despite its disproportionate impact on indigenous peoples.<sup>25</sup> Even in those cases where states attempt to take proactive steps to address the discriminatory underpinnings and impacts of mining legislation on human rights and the environment in line with their obligations under international human rights law, they find themselves constrained from doing so as a result of a parallel international legal architecture.<sup>26</sup>

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- 24 Submission to the Committee on the Elimination of All Forms of Racial Discrimination, Philippines Indigenous Peoples, ICERD, Shadow Report for the consolidated fifteenth, sixteenth, seventeenth, eighteenth, nineteenth and twentieth Philippine ICERD periodic reports. Committee on the Elimination of All Forms of Racial Discrimination, 73rd Session, 3-28 August 2009, at 35, at <<http://www2.ohchr.org/english/bodies/cerd/cerds75.htm>>. See also Robert Goodland and Clive Wicks *Philippines: Mining or Food* (Columbans, London, 2009), 21, at <[www.piplinks.org/miningorfood](http://www.piplinks.org/miningorfood)>.
- 25 This process is widespread and extends from colonial laws to recently enacted legislation and jurisprudence. Examples include the United States where under the 1872 Mining Law mining is deemed to be highest use of the land and overwrites indigenous peoples’ rights. The Philippines in the Supreme Court case *Didipio Earth-Savers’ Multi-Purpose Association [DESAMA] Inc. et al. vs. Elisea Gozun et al.*, G.R. No. 157882, 30 March 2006, which reaffirms a decree issued by the Dictator President Marcos declaring mining to be in the public interest. Art. 13 of the Colombian Mining Code (Law 685, 15 August 2001) declares mining to be of “public interest”. The law firm responsible for drafting the Code represented both Santa Fe, an oil and gas drilling company at the time owned by the Colombian President, and Semax, a Mexican cement company. See Valbuena Wouriyu, “Columbia: License to Plunder”, in Marcus Colchester and Emily Caruso (eds.), *Extracting Promises Indigenous Peoples, Extractive Industries and the World Bank* (Tebtebba Foundation and Forest Peoples Programme, Baguio and Moreton-on-Marsh, 2005), 157-158.
- 26 The current international arbitration case against South Africa in relation to its proposed mining act which includes including ‘Black Economic Empowerment’ measures is being challenged by European mining investors as being contrary to the protections in South Africa’s bilateral investment treaties. See Petition for Limited Participation as Non-Disputing Parties, Arts. 41(3), 27, 39, and 35 of the additional facility rules, International Centre for Settlement of Investment Disputes, Case No. ARB(AF)/07/01 between *Piero Foresti, Laura De Carli & others and the Republic of South Africa* Petitioners: *The Centre for Applied Legal Studies (CALS); The Center for International Environmental Law (CIEL); The International Centre for the Legal Protection of Human Rights (INTERIGHTS); The Legal Resources Centre (LRC)*, available at <<http://ita.law.uvic.ca/documents/ForestivSA-Petition.pdf>>. See also Legal Resource Centre South Africa, “South Africa’s Investment

This international legal architecture, that has been constructed to maintain the globalized economic model, consists of a multitude of bilateral and multilateral trade agreements and associated arbitration mechanisms. Many of these trade agreements provide access to resources located in indigenous peoples' territories. However, despite the profound impact they have on them, indigenous peoples are not even consulted in relation to their content and are often denied access to information in the contracts that they facilitate on the basis of confidentiality. The result is that "major development projects"<sup>27</sup> such as large-scale strip mining, the construction of mega-hydroelectric dams, monocrop agriculture—all of which require extensive access to indigenous territories and resources—can be and are imposed on indigenous peoples in the name of national development, regardless of their impact on them. From the perspective of indigenous peoples attempting to assert their rights, national development, rather than benefiting them, has been transformed into a weapon to be used against them.

Rodolfo Stavenhagen, the former UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples reported that in the context of development projects "the concerns of indigenous peoples who are seldom consulted on the matter, take a back seat to an overriding 'national interest', or to market-driven business objectives aimed at developing new economic activities, and maximizing productivity and profits".<sup>28</sup> Following his official visit to the Philippines in 2002, he noted that indigenous peoples aptly designated various development projects, which were proceeding without adequate consultation or community consent, as "development aggression".<sup>29</sup> The current UN Special Rapporteur James Anaya reported to the 2009 session of the Human Rights Council that he had received widespread complaints from indigenous peoples, with problems existing in almost all countries where indigenous peoples live, in relation to the lack of meaningful consultation in the context of development projects in their lands. According to the Special Rapporteur in many of these cases there was a "flagrant disregard for the rights of indigenous peoples".<sup>30</sup> The International Labour Organization (ILO) has also observed that the lack of adequate consultation and participation of indigenous peoples in decision-

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Treaties Must Meet its Human Rights Obligations", 27 July 2009, at <<http://www.lrc.org.za/documents>>.

27 Professor Stavenhagen, the former UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, defined "major development projects" as a process of "investment of public and/or private, national or international capital for the purpose of building or improving the physical infrastructure of a specified region, the transformation over the long run of productive activities involving changes in the use and property rights to land, the large-scale exploitation of natural resources including subsoil resources, the building of urban centres, manufacturing and/or mining and extraction plants, tourist developments, port facilities, military bases and similar undertakings". Report of the Special Rapporteur, UN Doc. E/CN.4/2003/90, 2.

28 *Ibid.* at para. 8, 5

29 Stavenhagen, *op.cit.* note 21.

30 Statements made by the UN Special Rapporteur, James Anaya, at the Human Rights Council, October 2009 Session Geneva, in response to questions posed by States. Notes on file with the authors.

making processes in relation to development projects, and in particular the extractive industry, is the major source of complaints under ILO Convention 169.<sup>31</sup>

Under international human rights law the participation of indigenous peoples in decision-making processes, and their associated rights to meaningful good faith consultations and free prior informed consent (FPIC), are of fundamental importance in the context of development projects, policies, legislation and agreements that impact on them. Their FPIC is required in relation to development projects under Article 32 of the UN Declaration on the Rights of Indigenous Peoples (UN DRIP) and in relation to policies and legislation under Article 19. This is in line with the guidance given by the Human Rights Committee, the Committee on Economic Social and Cultural Rights and the Committee on the Elimination of All Forms of Racial Discrimination which stress that state party adherence to their obligations under the respective treaties requires that they obtain indigenous peoples’ FPIC in relation to proposed development projects in their lands or any decisions that impact directly on indigenous peoples’ rights or interests.<sup>32</sup> This important relationship between FPIC and the impact of globalization on indigenous peoples is further elaborated in Part 3 of this article.

3. Pervasiveness and Profoundness of Impacts—from the three Cs to the three Ds  
Due to increased demand for minerals and energy, fuelled by the globalized market, major development projects, such as large-scale strip mining, are now seeking to operate in areas that previously were neither economically nor technically feasible. It has been estimated that, in the context of mineral resources, in the region of 60% of these targeted areas are located in indigenous peoples’ territories.<sup>33</sup> Indigenous peoples throughout the world are disproportionately impacted by large-scale development projects. In many cases the harm to their physical and cultural wellbeing has been irreversible. Displacement, destruction of sacred areas, damage to environment resulting in denial of traditional livelihood options, undermining of indigenous institutions and customary practices, the creation of division within communities are commonly accounted experiences. These combined effects—the deprivation of land, the degradation of biosphere resources, and the denial of self-determination—have come to

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31 The main situations involving indigenous and tribal peoples with which the ILO has dealt can be further researched at <<http://www.ilo.org/public/english/indigenous/standard/super1.htm>>.

32 For an overview of developments in relation to the respect for FPIC up to the end of 2008, see “Free Prior Informed Consent (FPIC)—A Universal Norm and Framework for Consultation and Benefit Sharing in Relation to Indigenous Peoples and the Extractive Sector, paper prepared for OHCHR Workshop on Extractive Industries, Indigenous Peoples and Human Rights Moscow, 3-4 December 2008, Cathal Doyle, University of Middlesex, at <[http://www2.ohchr.org/english/issues/indigenous/resource\\_companies.htm](http://www2.ohchr.org/english/issues/indigenous/resource_companies.htm)>. In 2009 the HRC reconfirmed this obligation to obtain indigenous peoples’ FPIC. See HRC, Communication No. 1457/2006, *Ángela Poma Poma v Peru*, CCPR/C/95/D/1457/2006, views of 24 April 2009, para. 7.2.

33 The Manila Declaration of the International Conference on Extractive Industries and Indigenous Peoples, 23-25 March 2009, Legend Villas, Metro Manila, Philippines, at <<http://www.tebtebba.org>>.

be referred to as ‘the three Ds’ of development,<sup>34</sup> the modern-day equivalent of colonialism’s ‘three Cs’. Not surprisingly, given this history and the fact that indigenous peoples’ development philosophies continue to be ignored in policy-making, and their consultation and consent rights in relation to projects denied, these attempts to enter into, or expand operations, in indigenous peoples’ lands are being met with strong resistance. Rather than address indigenous peoples’ complaints and the underlying issues pertaining to the denial of rights, states are responding by criminalizing opposition to development projects and by using force to suppress it. This is resulting in injuries and killings of indigenous peoples and their leaders.<sup>35</sup> The cumulative effects of these development projects, if they continue to be imposed in this manner, have the potential to threaten the very survival of many of the worlds’ indigenous peoples.

### *B. “Sustainable Development” and “Human Development”*

Two important and somewhat interrelated processes in the area of development came to the fore in the late 1980s and 1990s.<sup>36</sup> These two processes flowed from an examination of the relationship between development and the environment (“sustainable development”) and between development and the human subject (“human development”). This following section looks briefly at these two discourses and what their implications for indigenous peoples were.

In 1987, following the World Commission on Environment and Development (commonly referred to as the Brundtland Commission), the concept of “sustainable development” gained prominence. Under this concept development took on the extra dimension of having to meet “the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>37</sup> Sustainability was described

34 Roger Moody, “The Decade of Destruction: How Mining Companies Betrayed their Promised Greening”, 1 May 2001, at <<http://www.minesandcommunities.org/article.php?a=1670>>.

35 In addition to the case of Bagua mentioned in the introduction, a recent example of peaceful protests resulting in deaths and injuries occurred in Ecuador. See “Indígenas y Gobierno logran seis acuerdos (Ecuador)”, 6 October 2009, at <<http://www.business-humanrights.org/Links/Repository/368629>>. In the Philippines some 137 killings of indigenous people have been recorded in the period from 2001 to 2009. See Philippines Indigenous Peoples CERD Shadow Report, *op.cit.* note 24, at 63. For an overview of the trend towards the criminalization of indigenous leaders, see “*Being Sued, Defending the Mother Country? Criminalization of the Exercise of Indigenous Peoples’ Rights, Political and Legal Analysis, Columbia–Chile–Peru* (Coordination of Andean Indigenous Organizations – CAOI, Lima, 2008).

36 The seeds for these developments were sown in the 1970s and early 1980s when it was recognized during the second UN development decade that economic and social development were necessary for a human-centred focus to development. See Victoria Tauli-Corpuz, “The Concept of Indigenous Peoples’ Self-Determined Development or Development with Identity and Culture: Challenges and Trajectories”, Tebtebba Foundation, Baguio City, 2008, UN Doc. CLT/CPD/CPO/2008/IPS/02 2008, 14.

37 United Nations, World Commission on Environment and Development, Report to the General Assembly, General Assembly Resolution 42/187, 11 December 1987.

as "the term chosen to bridge the gulf between development and the environment."<sup>38</sup> While the notion of achieving a right balance between the exploitation of natural resources and the capacity of the earth to deal with such exploitation opened doors for a renewed approach to development, in practical terms there were significant difficulties in defining what sustainability is and how to operationalize it.<sup>39</sup> Nonetheless, the emergence of sustainability and environmental concerns into the arena of development provide the space for a reassessment of what development actually means. As a result of their engagement in fora such as the 1992 Earth Summit,<sup>40</sup> and given their traditional environmental knowledge, indigenous peoples came to be seen as important partners in this new pursuit of sustainable development. Probably the clearest articulation of this recognition of the role of indigenous peoples is found in Agenda 21, which in its Chapter 26 states: "[i]n view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities".

The concept of sustainable development influenced the policies of many international financial institutions, developmental and environmental agencies. For example, in 1994 the Inter-American Development Bank (IDB) established the "Indigenous Peoples and Community Development Unit" as part of its Sustainable Development Department. This resulted in the adoption of a policy and strategy paper on indigenous peoples which refers to "development with identity", through "strengthening of indigenous peoples, harmony with their environment, sound management of territories and natural resources, the generation and exercise of authority, and respect for indigenous rights, including the cultural, economic, social and institutional rights and values of indigenous peoples in accordance with their own worldview and governance".<sup>41</sup> Likewise, the World Bank adopted Operational Policy 4.10 on Indigenous Peoples to contribute "to the Bank's mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of indigenous peoples".<sup>42</sup> Hence the emergence of the concept of sustainable development facilitated a connection between environmental sustainability and respect for the rights of indigenous peoples.

Under the banner of sustainable development environmentalists and indigenous peoples appeared to have found common ground. However, there have been major limitations in using sustainable development as a platform for asserting indigenous peoples' rights in the context of development. Firstly, despite increased commitments from conservationists to respect indigenous peoples' rights in relation to protected areas, the translation of these commitments into practice has been slow and is still very

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38 Peter Rogers, Kazi Jalal and John Boyd, *An Introduction to Sustainable Development* (Earthscan, London, 2007), 22.

39 *Ibid.*

40 Tauli-Corpuz, *op.cit.* note 36, 19.

41 Operational Policy on Indigenous Peoples (OP-765), adopted by the Executive Board of Directors in February 2006.

42 World Bank, OP 4.10—Indigenous Peoples, July 2005, para. 1.



much an ongoing process.<sup>43</sup> While there have been developments at the policy level in many situations the primary concern of environmentalists appears to remain the protection of the natural environment, with consideration for the indigenous peoples living in it and their right to choose their own patterns of development being of a secondary nature. Secondly, the corporate sector and in particular the extractive industry, which many indigenous peoples perceived as one of the major obstacles to their realization of sustainable development, engaged with and in some cases dominated the sustainable development debate. The incorporation of the concept of “sustainable mining” into the action plan of the World Summit on Sustainable Development in 2002 by the mining sector<sup>44</sup> and the practice by companies of portraying themselves as environmentally friendly while continuing with business as usual, commonly referred to as ‘greenwashing’, served to undermine indigenous peoples’ confidence in the notion of sustainable development, and contribute to their perception of it as ‘old wine in new bottles’.<sup>45</sup> Third, despite their policies on indigenous peoples, international financial institutions continued to promote and finance projects that fail to respect indigenous peoples’ rights.<sup>46</sup>

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43 For an overview of the situation as of 2008 see Marcus Colchester, Maurizio Farhan Ferrari, John Nelson, Chris Kidd, Peninnah Zaninka, Messe Venant, Len Regpala, Grace T Balawag, Borromeo Motin, Banie Lasimbang, “Conservation and Indigenous Peoples: Assessing the Progress since Durban, Forest Peoples Programme, Moreton-in-Marsh, 2008, at <[http://www.forestpeoples.org/documents/conservation/wcc\\_conservation\\_and\\_ips\\_interim\\_rep\\_sept08\\_eng.pdf](http://www.forestpeoples.org/documents/conservation/wcc_conservation_and_ips_interim_rep_sept08_eng.pdf)>. See also Fergus MacKay, “Addressing Past Wrongs: Indigenous Peoples and Protected Areas—the Right to Restitution of Lands and Resources”, Forest Peoples Programme, Moreton-in-Marsh, 2002, at <[http://www.forestpeoples.org/documents/law\\_hr/ips\\_restitution\\_protected\\_areas\\_oct02a\\_eng.pdf](http://www.forestpeoples.org/documents/law_hr/ips_restitution_protected_areas_oct02a_eng.pdf)>.

44 Andy Whitmore, “The Emperor’s New Clothes: Sustainable Mining?” 14 *Journal of Cleaner Production* (2006), 309-314.

45 According to Daes, many of the indigenous peoples that she met during her extensive history of working with them “are opposed to the notion of ‘sustainable development’ which they regard as code of the illusory goal of continuous growth in human consumption”. Daes, *op.cit.* note 8, at 75

46 Rhoda Dalang and Jill Carino, *International Financial Institutions: Policy Reviews and their Impacts on Indigenous Peoples in Asia* (Cordillera Indigenous Peoples Legal Center (Dinteg) and Cordillera Women’s Education and Resource Center (CWERC) 2005); Raja Devasish Roy, *The Asian Development Bank’s Indigenous Peoples’ Policy and its Impact on Indigenous Peoples of Asia*, 2005, at <http://regionalcentrebangkok.undp.or.th/practices/governance/ripp/docs/3rd%20FINAL%20ADB.pdf>; Joan Carling, *Japan Bank for International Cooperation (JBIC) Guidelines for Confirmation of Environmental and Social Considerations: Its Implications on Indigenous Peoples* (Friends of the Earth Japan, 2005, at <<http://regionalcentrebangkok.undp.or.th/practices/governance/ripp/docs/4th%20FINAL%20JBIC.pdf>>; Fergus MacKay, *Indigenous Peoples and the Asian Development Framework: Multilateral Development Banks and Development Agreements Indigenous Peoples and the World Bank Group*, 2005, <<http://regionalcentrebangkok.undp.or.th/practices/governance/ripp/docs/5th%20FINAL%20IFC-IBRD.pdf>>. These papers were prepared for the UNDP Regional Initiative on Indigenous Peoples’ Rights and Development and Indigenous Peoples’ and the Human Rights-Based Approach to Development: Dialogue, The Philippines, Baguio City, 4-6 November 2005 which addressed the deficiencies in the policies and

However, indigenous peoples have continued to actively engage in the debate around Sustainable Development, participating in negotiations in the context of the Article 8(j) of the Convention of Biological Diversity (CBD) and discussions related to climate change.<sup>47</sup> International environmental agencies also appear to be progressing in their thinking recognizing that protection of the natural environment cannot be viewed as distinct from upholding the rights of the people who are dependent upon it for their survival.<sup>48</sup> Sustainable development has therefore, at least on paper, provided for some increased empowerment of indigenous peoples over developments impacting upon them. However, its potential to deliver on this promise in practice remains to be seen. All too often development projects, which purportedly adhere to the principles of sustainable development but which in reality are premised on preconceived or distorted notions of indigenous peoples’ relationship with their environments, continue to be imposed on them against their will.

As touched on earlier in this article, in parallel to the emergence of a heavy-handed, rights-compromising approach to development focused exclusively on macroeconomic outcomes, an alternative broader understanding of development as a “process that expands real freedoms that people enjoy” has also emerged. This vision sees the human subject as the primary focus of development. The concept has been termed “human development” and holds that development, both in terms of its process and its ends, should serve to expand human freedoms, capacities and choices. This perspective was reflected in the 1990s with the redefinition of development by the United Nations Development Programme (UNDP) as a process of expanding peoples’ choices and its statement that “human development is the end—economic growth a means”.<sup>49</sup> Likewise at the 1995 World Summit for Social Development in Copenhagen

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practices of the World Bank, the Japanese Bank for International Cooperation and the Asian Development Bank from the perspective of a HRBA to development.

- 47 Indigenous peoples are involved in a range of activities in relation to the CBD and climate change. Two examples include the UNPFII dedicating its 2008 session to the subject of climate change and indigenous peoples defining indicators in relation to their wellbeing in the context of the CBD. See *Concept Note Submitted by the Permanent Forum Special Rapporteurs: The Extent to Which Climate Change Policies and Projects Adhere to the Standards Set Forth in the United Nations Declaration on the Rights of Indigenous Peoples*, UN PFII Eighth Session, UN Doc. E/C.19/2009/5, 25 March 2009. See also *Report of the International Expert Meeting on Indicators Relevant for Indigenous and Local Communities and the Convention on Biological Diversity*, UN Doc. UNEP/CBD/WG8J/5/INF/2, 31 July 2007.
- 48 Examples of what the IUCN—The World Conservation Union considers good practice are presented in *World Commission on Protected Areas (WCPA) Indigenous and Traditional Peoples and Protected Areas Principles, Guidelines and Case Studies Best Practice*, Protected Area Guidelines Series No. 4, IUCN—The World Conservation Union, 2000, at <<http://data.iucn.org/dbtw-wpd/edocs/PAG-004.pdf>>.
- 49 In 1991, the UNDP started referring to development as an expansion of choices. The statement “human development is the end—economic growth a means” was the opening sentence of the UNDP 1996 Report on Human Development.

117 states agreed that people must be at the centre of development.<sup>50</sup> Sen's seminal work, *Development as Freedom*, expands on this concept. In it Sen posits that expansions in human freedoms are both "the primary end" and the "principle means" of development. The "human development" approach broadened indicators of development beyond Gross National Product (GNP) and increases in individual incomes. Under this model the need to address inequalities in income distribution, life expectancy, adult literacy, access to education and other factors influencing the participation of the human subject in growth and their opportunities to benefit from it were seen as essential for the sustainability of economic growth. While this indicates a significant shift in the way development was conceived and measured, the approach fails to adequately address the specific issues that indigenous peoples face and the principles that need to be respected for these challenges to be addressed in an equitable and just manner. While Sen briefly considers the threat of globalization to "indigenous cultural modes" his focus is on culture as it pertains to society as a whole, rather than the specificities of indigenous peoples' cultures. Noting that the impact of globalization on these "modes" is serious and largely "inescapable",<sup>51</sup> he argues that, in the context of economic disparities and employment, the "appropriate response" may be to aim to achieve a "gradual transition" while ensuring that the model of globalization implemented is the least destructive possible to traditional livelihoods. To achieve this, and to address the potential loss of cultures that come with globalization, Sen proposes that "it is up to society to determine, what, if anything it wants to do to preserve old forms of living", with all sections of society participating freely in informed decision-making processes such as elections, referenda and through "the general use of civil rights".<sup>52</sup>

Viewed from the perspective of indigenous peoples, this approach, which does not explicitly address their specific rights and experiences with globalization, still leaves a number of fundamental issues unaddressed. Firstly, leaving the determination of what elements of indigenous cultures should be preserved up to society as a whole would be incompatible with the right of indigenous peoples to self-determination. As with other models of development it essentially leaves them victim to the will of the majority. Under such circumstances laws and policies which are "facially neutral" could be adopted despite the fact that these can be "unjust and exploitative—even viciously repressive of particular groups in society".<sup>53</sup> Secondly, the role and importance of indigenous decision-making processes, their customary laws and practices and institutions is not addressed. In many traditional cultures instant democratic style decision-making may be alien to, and incompatible with, traditional consensus based decision-making models.<sup>54</sup> Thirdly, the unique position of indigenous peoples who face

50 Final Report of the World Summit for Social Development, World Summit for Social Development, Copenhagen, 6-12 March 1995, A/CONF.166/9, at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/116/51/PDF/N9511651.pdf?OpenElement>>.

51 Sen, *op.cit.* note 18, 240.

52 *Ibid.*, 242.

53 Daes, *op.cit.* note 8, 85.

54 This point was raised in discussions at the International Workshop on Natural Resource Companies, "Indigenous Peoples and Human Rights: Setting a Framework for Consulta-

the most profound impacts of globalization is not explicitly addressed—particularly in relation to the impacts of large-scale development projects that may be justified as being in the public interest. Finally, the focus of Sen's argument is on individual freedom. As such, it does not address the issue of collective rights, which are fundamental to indigenous peoples' philosophies and perspectives.<sup>55</sup> This difference in perspectives is also found in the anthropocentric concept of "human development", the philosophical underpinning of which differ from many indigenous peoples world views and cosmovisions in which man is merely part of a greater whole rather than its central element. This is not to say that the principles outlined by Sen are antithetical to indigenous peoples' rights. In fact the opposite is the case. In discussing society's determination of what aspects of culture should or should not be preserved, Sen also notes "human rights in their broadest sense are involved in this exercise as well".<sup>56</sup> This clearly must include respect for the contemporary recognition of the rights of indigenous peoples under the UN DRIP and international human rights law. His arguments therefore, if formulated within the specific context of indigenous peoples' world views, their contemporary and historical realities, their collective identities and relationship with their lands and their inherent right to self-determination are highly relevant and applicable in the context of indigenous peoples' right to development.

While the "sustainable development" and "human development" discourses both offered major improvements over prior development frameworks, fundamental problems remained with implementation practice *vis-à-vis* indigenous peoples' rights. From the perspective of indigenous peoples both frameworks, unless conditioned on their right to self-determination, maintain elements of an integrationist model of

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tion, Benefit-Sharing And Dispute Resolution", Moscow, 3-4 December 2008. Notes on file with the author.

- 55 See Allen Buchanan, "The Role of Collective Rights in the Theory of Indigenous Peoples' Rights", 3 *Transnational Law and Contemporary Problems* (1993), 89-103, addressing the demands that indigenous peoples made for the recognition of their collective land rights. Indigenous peoples concepts of collective ownership of land has been recognized in ILO Convention 169 and in national legislation such as the 1997 Philippines Indigenous Peoples Rights Act which states that the "[i]ndigenous concept of ownership sustains the view that ancestral domains and all resources found therein shall serve as the material bases of their cultural integrity. The indigenous concept of ownership generally holds that ancestral domains are the [indigenous peoples'] private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed. It likewise covers sustainable traditional resource rights." For reading addressing indigenous peoples' perspectives and philosophies, see Marie Battiste, *Reclaiming Indigenous Voice and Vision* (UBC Press, Tronto, 2000); and Julian E. Kunnie and Noalungelo I. Goduka, *Indigenous Peoples' Wisdom and Power: Affirming Our Knowledge through Narratives* (Ashgate Publishing Ltd., Aldershot, 2006).
- 56 Sen, *op.cit.* note 18, 242; For an analysis of how Sen's capability model could be applied in the context of indigenous peoples' right to health in Australia, see Francesca Panzironi, "Indigenous Peoples' Right To Self-Determination and Development Policy", Thesis submitted to fulfil the requirements for the award of Doctor of Philosophy, Faculty of Law, University of Sydney, 2006, at Sydney eScholarship Repository, <<http://ses.library.usyd.edu.au/handle/2123/1699>>.

development under which they can be treated as passive subjects of national development rather than actors controlling their own development. For indigenous peoples the next and long overdue phase in the history of development has to be one where development models are not imposed on, or designed for, them by external actors, be they international institutions, governments or multinational corporations. Instead it must be one that sees indigenous peoples themselves as having the determining say in the process to be followed and ends to be aimed for in their own development path. This new model of development is one to which indigenous peoples are increasingly referring as self-determined development.<sup>57</sup> Before addressing this it is first necessary to contextualize it within developments in the broader interplay of human rights and development.

### *C. Human Rights Based Approach to Development*

In parallel with the emergence of a debate on sustainable development and the redefinition of development as an expansion of human freedoms, choices and capacities, a related debate on the relationship between human rights and development was taking place. While common Article 1 on the right to self-determination of the Covenant on Civil and Political Rights and the Covenant on Economic Social and Cultural Rights establishes the right of all peoples “to freely pursue their economic, social and cultural development” it was not until 1986, when the UN Declaration on the Right to Development was adopted, that the relationship between development and human rights was given serious and focused consideration by states.<sup>58</sup> The right reaffirmed

57 See Consultation Workshop and Dialogue on “Indigenous Peoples’ Self-Determined Development or Development with Identity”, 14–17 March 2008, Tivoli, 11–18 April 2008, UN Doc. E/C.19/2008/CRP; Victoria Tauli-Corpuz, “A Framework for Advocacy in Support of Indigenous Peoples’ Visions, Perspectives and Strategies for Self-Determining Development”, in *Indigenous Peoples and the Human Rights-Based Approach to Development: Engaging in Dialogue*, Cordillera Indigenous Peoples’ Legal Centre (DINTEG) and UNDP Regional Initiative on Indigenous Peoples’ Rights and Development (RIPP), (UNDP, Bangkok, 2007); Victoria Tauli-Corpuz (ed.), *Good Practices on Indigenous Peoples’ Development* (Tebtebba and UN Permanent Forum on Indigenous Peoples Issues, Baguio and New York, 2006), 70–72, 269; Philippines Indigenous Peoples ICERD Shadow Report, *op.cit.* note 24, 32–54. The UN PFII 9th Session will focus on development with identity, and Arts. 3 and 32 of the UN DRIP. See also Colin H. Scott, “On Autonomy and Development”, in Colin H. Scott (ed.) *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (UBC Press, Toronto, 2001), xii, 4. As part of an Indigenous Peoples and Self-Determined Development Project coordinated by Tebtebba, a Global Network for Indigenous Peoples’ Self-Determined Development was established under this project. This is composed of indigenous leaders and representatives of various indigenous peoples’ formations and institutions and individuals from UN agencies, programmes and funds, CGIAR (Consultative Group on International Agricultural Research) and from NGOs that are advocates of indigenous peoples’ rights and self-determined development’, at <[http://www.tebtebba.org/index.php?option=com\\_content&view=article&id=13&Itemid=25](http://www.tebtebba.org/index.php?option=com_content&view=article&id=13&Itemid=25)>.

58 The right to development was addressed by the Commission on Human Rights in 1977 and 1979, but it was not until 1986 that a declaration was adopted by vote. The only state

the indivisibility of human rights as it spanned the entire spectrum of civil, political, economic social and cultural rights.<sup>59</sup> The content of the right was elaborated on in 2000 by the Independent Expert on the Right to Development, Arjun Sengupta, with reference to states' obligations to ensure that indigenous peoples "have access to productive assets such as land, credit and means of self-employment".<sup>60</sup> Following the reform of the UN system in 1997 and the Secretary-General's call to mainstream human rights in its activities, UN agencies began promoting a Human Rights-Based Approach (HRBA) to development—based on the principles of universality and inalienability; indivisibility; interdependence and inter-relatedness; non-discrimination and equality; participation and inclusion; accountability and the rule of law—in their projects and activities.<sup>61</sup> Daes argues that the concept of "human development" is now accepted as being the means of development and that this includes the realization of human rights.<sup>62</sup> However the degree to which the HRBA has been successfully infused into development projects both inside and outside of the UN system has varied. This is particularly the case in the context of development projects impacting on indigenous peoples where the operationalization and implementation of the HRBA has been described as 'not happening in any significant manner'.<sup>63</sup> In many cases their specific rights and interests are not given due consideration or worse still continue to be negatively impacted as a result of these projects. A recent example of this is the Millennium Development Goals (MDG) project. In spite of the fact that the Millennium Declaration<sup>64</sup> specifically mentions respect for all internationally recognized human rights and fundamental freedoms the need for a more integrated approach between the development and human rights agendas in its implementation has become evident.<sup>65</sup> In the specific context of indigenous peoples, it has been pointed out that, due to the failure to incorporate their perspectives in its initial design and to

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to vote against the adoption of the declaration was the United States, which is currently one of only three states that oppose the Declaration on the Rights of Indigenous Peoples.

59 UN Declaration on the Right to Development, A/RES/41/128, Art. 6.

60 The Right to Development Report of the Independent Expert on the Right to Development, Dr. Arjun Sengupta, pursuant to General Assembly Resolution 54/175 and Commission on Human Rights Resolution E/CN.4/RES/2000/5, 11 September 2000, UN Doc. E/CN.4/2000/WG.18/CRP.1, para. 67.

61 See The Human Rights-Based Approach to Development Cooperation: Towards a Common Understanding among United Nations Agencies, at <[http://www.undp.org/governance/docs/HR\\_Guides\\_CommonUnderstanding.pdf](http://www.undp.org/governance/docs/HR_Guides_CommonUnderstanding.pdf)>. The adoption of a HRBA to Development commenced in 1997 with an interagency meeting addressing common policies and practices in relation to a HRBA held in 2003. For additional information on the HRBA to development, see *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (OHCHR New York and Geneva, 2006).

62 Daes, *op.cit.* note 8, 102.

63 Tauli-Corpuz, *op.cit.* note 57, 104.

64 United Nations Millennium Declaration, A/res/55/2, at <<http://www.un.org/millennium/declaration/ares552e.htm>>.

65 Special Edition: Millennium Development Goals and Human Rights, 13 *International Journal of Human Rights* (2009).



ensure respect for their rights in its implementation, the MDG project may pose risks of negative impacts to their well-being rather than improvements in their poverty situation.<sup>66</sup> The UN Permanent Forum on Indigenous Issues (PFII) has raised the issue to the attention of States and UN agencies and is actively promoting the implementation of the MDG projects in accordance with indigenous peoples' rights.<sup>67</sup> The following section will touch on recent evolutions in the HRBA as it pertains to indigenous peoples and the relevance of this to the realization of self-determined development.

### III. TOWARDS "SELF-DETERMINED DEVELOPMENT"

As briefly outlined in the previous section recent decades have seen the emergence of the right to development as a fundamental human right followed by the adoption of a human rights based approach to development. This same timeframe has seen a significant evolution in the normative framework addressing the human rights of indigenous peoples. Fundamental to this development has been the recognition of indigenous peoples as "Peoples" with the inherent right to self-determination.<sup>68</sup> These two evolutionary trends find their nexus in the concept of 'self-determined development'. Other terms such as 'development with identity and dignity' and 'development with identity' have also emerged to address the right to development as it applies to indigenous peoples. These three terms are sometimes used interchangeably, although the term self-determined development has emerged as the one preferred by indigenous leaders and communities.<sup>69</sup> Before addressing the concept of self-determined development, this article will look briefly at recent developments in the recognition of indigenous peoples' rights.

We are now approaching the mid-point of the Second International Decade of the World's Indigenous Peoples (2005-2015). The theme of the decade is 'partnership in action and dignity'. Under this umbrella, the decade's Programme of Action states that one of its aims is "redefining development policies that depart from a vision of

66 Cathal Doyle, "Indigenous Peoples and the Millennium Development Goals—'Sacrificial Lambs' or Equal Beneficiaries?" 13 *International Journal of Human Rights*, Special Edition (2009), 44-72.

67 Kelley Laird, "MDG Reports and Indigenous Peoples, desk review prepared for the Secretariat of the UN PFII January 2006; Secretariat of the UN PFII, "MDG Reports and Indigenous Peoples", desk review no. 2, March 2007; Bonny Hartley, MDG Reports and Indigenous Peoples, desk review no. 3 prepared for the Secretariat of the UN PFII, February 2008.

68 See for example HRC, Concluding Observations: Canada, 7 April 1999, UN Doc. CCPR/C/79/Add.105; and CERD General Recommendation XXI. For analysis of the issue see Martin Scheinin, "The Right to Self-Determination under the Covenant on Civil and Political Rights", in Pekka Aikio and Martin Scheinin, *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Turku/Abo, 2000), 179-202. See also Fergus Mackay, "Indigenous Peoples' Rights and Resource Exploitation", 12 *Philippine Natural Resources Law Journal* (2004), 34-71.

69 Consultation Workshop and Dialogue, "Indigenous Peoples' Self-Determined Development or Development with Identity", 14-17 March 2008, Tivoli, 11-18 April 2008, UN Doc. E/C.19/2008/CRP.

equity and that are culturally appropriate including respect for cultural and linguistic diversity of indigenous peoples". Implicit in the realization of this objective is the necessity to shift from the imposed forms of development to self-determined forms of development. The following section examines how international law is gradually but surely evolving towards the adoption of this new development paradigm under which indigenous peoples are no longer victims of, but actors in, development.

The recognition of indigenous peoples' right to development with identity and the negative impacts of mainstream development on them, in particular extractive projects, was articulated in regional declarations in the late 1970s and early 1980s.<sup>70</sup> At the level of international law, however, the first major step towards recognizing this right to self-determined development came with the revision of the assimilationist and integrationist ILO Convention 107. The entry into force in 1989 of ILO Convention 169, which remains the only international treaty dedicated to the rights of indigenous peoples, heralded the commencement of a new era in the recognition of the rights of indigenous peoples. Despite its relatively low ratification rate ILO Convention 169 is now regarded by many as reflecting norms of international law applicable to all indigenous peoples. Article 7(1) of ILO Convention 169 reads:

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

For the first time an international legal instrument articulated the right of indigenous peoples to determine their own development priorities and to exercise control over their implementation. Equally important the Convention instructs states to ensure indigenous participation in the entire lifespan of the national development process. However, despite its constructive approach the implementation and oversight of the ILO Convention are weakened due to both the aforementioned low levels of ratification, and to the fact that indigenous peoples cannot participate in tripartite discussion between states, employers, and employees.

The year 1993 also marked an important step in efforts to ensure indigenous peoples' equal enjoyment of the right to development. The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights that year specifically addressed indigenous peoples' enjoyment of the right to sustainable

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70 See 1977 Declaration of Principles for the Defense of Indigenous Nations and Peoples of the Western Hemisphere; and the 1981 Declaration of San Jose, UNESCO Latin American Conference, UNESCO Doc. FS 82/WF.32 (1982), which asserted the right to ethno-development and self-determination. See S. James Anaya, *Indigenous Peoples and International Law* (Oxford University Press, Oxford, 2004), 192, for text of San Jose Declaration; see also Tauli-Corpuz, *op.cit.* note 36, 18, for a brief discussion on these two declarations.

development. It required states to “ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them...on the basis of equality and non-discrimination, and [to] recognize the value and diversity of their distinct identities, cultures and social organization”.<sup>71</sup> In calling for the completion of the drafting of the Declaration on the Rights of Indigenous Peoples, the establishment of the UN Permanent Forum on Indigenous Issues (UN PFII) and the proclamation of an International Decade (1994-2005) of the World’s Indigenous Peoples, the declaration served as an important stepping stone from the practice of imposing external concepts of development on indigenous peoples towards a process of empowerment that enables the peoples concerned to formulate their own right to development.

The adoption of the UN Declaration on the Rights of Indigenous Peoples (UN DRIP) by the General Assembly in 2007, is a tangible reflection of the evolution that the last two decades have seen in the normative framework of indigenous peoples’ rights. UN bodies, including special rapporteurs, human rights treaty bodies and the ILO, have been active in strengthening and clarifying the international legal framework pertaining to indigenous peoples’ rights through their recommendations and jurisprudence. The focus of this body of law has spanned a broad range of issues from indigenous peoples’ land rights, traditional livelihoods, rights to culture, to participation and self-determination rights. Increasing attention is being given to obtaining indigenous peoples free prior informed consent in the context of externally initiated development activities in their lands. This is seen as an obligation that flows from the Convention on the Elimination of All Forms of Racial Discrimination, the Covenant on Civil and Political Rights and the Covenant on Economic Social and Cultural Rights. It is particularly emphasized in the context of extractive operations, where complaints of violations of indigenous peoples’ rights are most common. Similar developments in jurisprudence pertaining to indigenous rights have taken place at the level of regional systems, most notably the Inter-American system.<sup>72</sup> At the national level an increasing number of states are formalizing their recognition of the rights of indigenous peoples, either through court rulings or constitutional or legislative protection. Emerging from this cumulative body of law addressing the rights of indigenous peoples is a series of obligations on states in relation to self-determined development. These include indigenous peoples’ rights to self-determination; to determine their own

71 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, A/CONF.157/23, 12 July 1993.

72 Inter-American Court cases: *Saramaka v. Suriname*, Judgment, 28 November 2007 Series C No. 172 [2007] IACHR 5; *Yakye Axa v. Paraguay*, Judgment, 17 June 2005 Series C No. 125 [2005] IACHR 6; *Moiwana Village v. Suriname*, Judgment, 15 June 2005 Series C No. 124 [2005] IACHR 5; *Yatama v. Nicaragua* (2005), Judgment, June 23 2005 Series C No. 127 [2005] IACHR 9; *Agwas Tingni v. Nicaragua*, Judgment, 31 August 2001 Series C No. 79 [2001] IACHR 9; and the Inter-American Commission case of *Shoshone v. United States* 27 December 2002 Report No 75/02 Case 11.140.

CERD, Concluding Observations: Canada, CERD/C/CAN/CO/18, 25 May 2007, para. 21 and “to own, exploit, control and use their lands, their resources and their communal territories”; CERD, Concluding Observations: Democratic Republic of Congo, CERD/C/COD/CO/15, 17 August 2007, para. 18.

development priorities; to control development activities in their lands and to participate actively in them, to own, exploit, develop, control and use their, lands, territories and resources;<sup>73</sup> to benefit directly from the use of their intellectual property and resources in their lands;<sup>74</sup> to sustainable economic and social development compatible with their cultural characteristics; to maintain and develop their traditional culture, including traditional livelihoods, and way of life;<sup>75</sup> and to full and effective participation in decisions at all levels that pertain to development plans, policies or legislation impacting on their rights and interests.<sup>76</sup> State obligations include ensuring that interpretations of national interest, modernization and economic and social development do not compromise the rights of indigenous peoples, including their right to development.<sup>77</sup> This jurisprudence, much of which was developed during the drafting and negotiation of the UN DRIP, served to substantiate the positions of indigenous peoples during the declaration negotiations, and is reflected in its final content.

Some states and industry bodies have emphasised the fact that the UN DRIP, being a declaration rather than a treaty, is “soft law” of a “non-binding” nature.<sup>78</sup> The UN Permanent Forum on Indigenous Issues (PFII) addressed this issue in its first General Comment in 2009 on the implementation of the UN DRIP, noting that fact

73 CERD, Concluding Observations: Canada, CERD/C/CAN/CO/18, 25 May 2007, para. 21 and “to own, exploit, control and use their lands, their resources and their communal territories”; CERD, Concluding Observations: Democratic Republic of Congo, CERD/C/COD/CO/15, 17 August 2007, para. 18.

74 CESCR, Concluding Observations: Bolivia, CESCR E/C.12/IND/CO/5, 8 August 2008, para. 37 and ILO Convention 169.

75 CESCR, Concluding Observations: Sweden, CESCR E/C.12/SWE/CO/5, 1 December 2008, para. 15.

76 CERD, Concluding Observations: Ethiopia, CERD/C/ETH/CO/15, 20 June 2007, para. 22.

77 CERD and CESCR Concluding Observations: Indonesia, CERD/C/IDN/CO/3, 15 August 2007, para. 16. See also CERD, General Recommendation XXIII. Other examples of situations where elements of self-determined development have been addressed include: “to maintain and develop their traditional culture and way of life”, Finland, CESCR E/C.12/CO/FIN/5, 16 January 2008, para 11; “to cultural development”, Costa Rica, CESCR E/C.12/CRI/CO/4, 4 January 2008, para. 7; “not to be displaced from their lands as a result of development projects India”, CESCR E/C.12/IND/CO/5, 10 May 2008, para. 31; “to ensure that development measures and projects do not affect their rights of members of indigenous communities to take part in cultural life”, India, CESCR E/C.12/IND/CO/5, 10 May 2008, para. 44; “the right to the preservation, protection and development of their cultural heritage and identity”, Kenya, CESCR E/C.12/KEN/CO/1, 1 December 2008, para 35. For further examples of the UN treaty body jurisprudence see Fergus MacKay, *Compilations of UN Treaty Body Jurisprudence Volumes I, II and III Covering the Years 1993–2008*, Forest Peoples Programme.

78 See “International Council of Mining and Metals Position Statement Mining and Indigenous Peoples”, May 2008, which places an emphasis on the non-binding nature of the declarations and qualifications made by states upon adopting it. This position of the New Zealand government that the treaty is “aspirational and is not legally binding” was stated in parliamentary questions following the announcement of the Australian government that it would support the Declaration. See <<http://www.apc.org.nz/pma/dec0409.htm/>>.

that the UN DRIP is not a treaty does not imply that it does not have any legally binding effect.<sup>79</sup> This position is consistent with the opinion of independent experts and academics who view over emphasis on classifying the UN DRIP as ‘binding’ or ‘non-binding’ as failing to contextualize it within the overall normative human rights framework, thereby potentially underestimating its importance as an interpretative guide for ‘hard law’ instruments.<sup>80</sup>

Victoria Tauli Corpuz, the current chair of the UN PFII, describes the UN DRIP as the “main framework to be used to further flesh out, elaborate and operationalize the concept and practice of indigenous peoples’ self-determined development”.<sup>81</sup> The central place accorded to indigenous peoples’ right to development is evident from the preamble of the declaration, which includes seven references to it. The preamble clarifies that indigenous peoples’ current lack of enjoyment of their right to development, in accordance with their “own needs and interests”, is a result of the dispossession of their lands, territories and resources. The enjoyment of their rights to lands and resources is therefore seen as a prerequisite for the realization of their right to development. The preamble further emphasizes this relationship and the links with indigenous peoples’ governance and cultural rights by noting that: “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs”.

In addition to its relationship with lands and resources the right to development, as it is framed in the UN DRIP, is also an integral component of a peoples’ right to

79 General Comment on Art. 42 of the UNPFII on the UN Declaration, UN Doc. E/C/19/2009/14, Annex to UN PFII Report of the 8th session, 12.

80 See comment of Professor Patrick Thornberry, CERD committee member, who raises the issue of whether the discussion of ‘soft law’ versus ‘hard law’ underestimates the future effect of the UN DRIP as a guide to the interpretation of other ‘hard law’ instruments. Briefing on the United Nations Declaration on the Rights of Indigenous Peoples, 22 February 2008, UN Doc. CERD/C/SR.1848/Add.1, para. 10. The Universal Declaration on Human Rights is an example of a ‘soft law’ instrument that has served to influence international law as well as national constitutions and legislation since its adoption in 1948. Other academics such as Professor James Anaya, the current Special Rapporteur on Indigenous Peoples’ Issues, and Professor Siegfried Wiessner have argued that, while the UN DRIP is not a treaty, the rights articulated in it are reflective of contemporary international law as it pertains to indigenous peoples. S. James Anaya and Siegfried Wiessner, “The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment”, 3 *JURIST* (2007), at <<http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>>. The citing of the UN DRIP by the Supreme Court of Belize in the case of the *Mayan Village of Santa Cruz v. The Attorney General of Belize and the Minister of Natural Resources and Environment* is an example of this. See Belize Supreme Court, Consolidated Claims Claim Nos. 171, 172, 2007, para. 131. The court stated that “General Assembly resolutions are not ordinarily binding on member states. But where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them”, noting that articles of the declaration reflect “the growing consensus and the general principles of international law on indigenous peoples and their lands and resources”.

81 Tauli-Corpuz, *op.cit.* note 36, 3.

self-determination. Indigenous peoples' right to self-determination is regarded as the foundational right from which all other rights flow. This causal relationship is explicit in the context of the right to development with Article 3 of the UN DRIP stating: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

This article is replicated from common Article 1(1) of the two international human rights covenants, in recognition of the fact that the right to self-determination applies to all peoples, including indigenous peoples.<sup>82</sup> However, throughout the UN DRIP negotiations a number of states resisted indigenous peoples' claims to a right to self-determination on the basis that it embodied the right of secession.<sup>83</sup> As a result of this position Article 46(1) states that nothing in the declaration may be construed as authorizing the dismemberment of a state's territorial integrity. The implications of this article on the exercise of the right to self-determination, when read in light of the preambular requirement that "nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law", remain contested.<sup>84</sup>

Given that for most indigenous peoples secession is not a realistic, or even desirable option, limiting the debate to this mode of self-determination tended to detract from other important elements of the right.<sup>85</sup> One element that has received insuf-

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82 UN Treaty bodies have clarified that the right to self-determination applies to all peoples including indigenous peoples, see HRC, Concluding Observations: Canada, 7 April 1999, UN Doc. CCPR/C/79/Add.105; and Martin Scheinin, "The Right to Self-Determination under the Covenant on Civil and Political Rights", in Aikio and Scheinin, *op.cit.* note 69, 179-202.

83 This issue was raised on a number of occasions by states in the negotiations surrounding the UN DRIP, and stands in contrast to the relatively uncontroversial inclusion of the right to self-determination for all peoples in Art. 1(2) of the UN Declaration on the Right to Development (A/RES/41/128). Attention has now shifted from recognition of indigenous peoples' right to self-determination in the UN DRIP towards how to operationalize this right.

84 Claire Charters, "Indigenous Peoples and International Law and Policy", in Benjamin J. Richardson, Shin Imai and Ken McNeil (eds.), *Indigenous Peoples and the Law* (Hart Publishing, Oxford, 2009), 164, arguing that in academics such as Professor James Anaya and Andrew Huff have made the case that in certain circumstances, where the criteria of international law have been met, indigenous peoples may be entitled to secede and create new states. On the other hand, authors such as Cassese have made the case for a limited form of self-determination and autonomy which has given rise to the concept of "internal self-determination". Under this interpretation secession is only an option in the context of "irremediably repressive and despotic" states. See Antonio Cassese, *Self-Determination of Peoples* (Cambridge University Press, 1995), 57-62. For additional reading on indigenous peoples' right to self-determination, see Erica-Irene A. Daes, "Some Considerations on the Right of Indigenous Peoples to Self-Determination", 3 *Transnational Law and Contemporary Problems* (1993), 1-11; Imai, *op.cit.* note 11, 285.

85 John B. Henriksen, "Implementation of the Right of Self-Determination of Indigenous Peoples within the Framework of Human Security", International Conference on Indigenous Peoples' Self-Determination and the Nation State in Asia Baguio, Philippines,



ficient attention to date is its developmental aspect. The adoption of the UN DRIP plays an important role in redirecting attention towards this central aspect of the right to self-determination. In doing so it highlights the indivisibility of indigenous peoples' economic, social and cultural, and civil and political rights. Given the high degree of interdependence between the rights recognized in the UN DRIP it has been pointed out that it is essential that it be read as a whole rather than dissected and analysed in parts. This is particularly the case in the context of the right to development, elements of which are found throughout the declaration. While the term 'self-determined development' does not appear as such in the declaration, its spirit is clearly affirmed throughout the document.<sup>86</sup>

This central role of indigenous peoples' right to self-determination, and its implications for the HRBA to development as it pertains to indigenous peoples, has been recognized by the UN Development Group (UNDG). In 2008, in line with the requirements of the UN DRIP that UN bodies and agencies contribute to the full realization of its provisions and promote respect for their full application,<sup>87</sup> the UNDG issued guidelines on indigenous peoples' issues. These guidelines, which are based on the normative framework of indigenous peoples' rights, including the UN DRIP, start from the premise that indigenous peoples' poverty and exclusion is to a large extent the result of the major challenges they face in realizing their own models of development. To address this issue the guidelines provide the UN system, and specifically UN country teams, with a framework for implementation of a "human rights-based and culturally sensitive approach to development for and with indigenous peoples".<sup>88</sup>

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18-21 April 1999, 14; see also David Weissbrodt and Wendy Mahling, "Highlights of the 46th Session of the Sub-Commission", 1994, at <<http://www1.umn.edu/humanrts/demo/subrept.htm>>, noting that "[m]ost indigenous leaders have not characterized the right to self-determination as primarily the right to secede".

- 86 One of the central topics addressed in the declaration that is closely correlated with self-determined development is the question of indigenous peoples' identity and culture, which are essential elements of the right to self-determination. The declaration recognizes that identity and culture embody indigenous peoples' relationship with their lands and resources, the maintenance and development of distinctive institutions, their continuation and revival of their customs, practices, judicial systems and traditional knowledge. These rights are elaborated in the context of participation and ownership rights. The declaration also addresses other important aspects of identity and culture in the context of development. These include the right to develop manifestations of indigenous cultures (Art. 11), the right to develop and teach spiritual and religious traditions (Art. 12), the right to develop oral traditions, philosophies and languages (Art. 13), and right to control and develop their cultural heritage, traditional knowledge and traditional cultural expressions (Art. 31).
- 87 Art. 41 of the UN DRIP specifically calls on UN organs and specialized agencies to contribute to the full realization of the provisions of the declaration. Art. 42 calls for the UN; its bodies, including the UN PFII; and specialized agencies, including at the country level to promote respect for the full application of its provisions.
- 88 UN Development Group Guidelines on Indigenous Peoples Issues, 2009, prepared by a task team of the Inter Agency Support Group (IASG) on Indigenous Issues, at <[www.undg.org/P=221](http://www.undg.org/P=221)>.

This culturally sensitive HRBA to development is considered by indigenous peoples as being one of the key principles underpinning their self-determined development framework.<sup>89</sup>

Rather than attempting an exhaustive analysis of the components of the right to development that emerge from the declaration, the remainder of this article seeks to assess two significant, and in some contexts controversial, aspects of self-determined development that have come to the fore as priority topics in recent discussions on the operationalization of the UN DRIP. The context of the extractive sector has been chosen for analysis, as this is an area where much of the attention of indigenous peoples has been focused in relation to the operationalization of the UN DRIP, a fact reflected in the number of complaints made regarding the sector, and the conduct of a series of high-level meetings in relation to it that involved indigenous peoples, states, UN agencies and bodies, and industry. The first of these themes is indigenous peoples’ participation in decision-making through their own representative institutions and the associated requirement to obtain their free prior informed consent. The second theme relates to indigenous peoples’ rights over the natural resources found in their territories. Examples emerging from recent workshops, conferences and expert group meetings are provided to contextualize the discussion.

#### IV. THE OPERATIONALIZATION OF SELF-DETERMINED DEVELOPMENT

##### *A. Self-Determined Development and Free, Prior and Informed Consent: Two Sides of the Same Coin*

In his analysis of indigenous self-determination Shin Imai notes that “[s]elf-determination refers to a choice, not a particular institutional relationship”.<sup>90</sup> This definition of self-determination finds resonance with that of the International Court of Justice, which defined the principle of self-determination “as the need to pay regard to the freely expressed will of peoples”.<sup>91</sup>

The choice implicit in the right to self determination can result in a number of possible outcomes depending on the particular circumstances and aspirations of the indigenous peoples in question. These outcomes include, but are not limited to, autonomy and self government as guaranteed under Article 4 of the UN DRIP:<sup>92</sup> according

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89 Tauli-Corpuz, *op.cit.* note 58, 97.

90 Imai, *op.cit.* note 11, 292. Imai also notes that self determination includes “the right of a people to decide how it wants to relate to a majoritarian population”.

91 ICJ, *Western Sahara*, Advisory Opinion, ICJ Reports (1975), 12, at 33.

92 Imai discusses four possible outcomes: sovereignty and self government, self administration and self management, co-management and joint management, and participation in public government. Imai, *op.cit.* note 11, 292. Art. 4 of the UN DRIP refers to autonomy and self-governance as rights that flow from the exercise of self determination. However, it does limit the outcome of self-determination to these rights. Henriksen, *op.cit.* note 85, 27, a Saami lawyer and member of the UN Expert Mechanism on Indigenous Issues has noted that where the outcome of the exercise of self-determination is autonomy or self-

to Imai, indigenous peoples and states tend to view self-determination from different perspectives. States tend to focus on jurisdiction and relative power issues in relation to indigenous peoples legislative capacity and their associated enforcement structures.<sup>93</sup> Indigenous peoples meanwhile tend to view self determination “in terms of ongoing resistance to the encroachment of non-Indigenous social, economic and political structures”.<sup>94</sup>

Indigenous peoples’ self governance and autonomy rights are closely related to other self determination rights such as participation in decision-making and maintenance and development of distinct indigenous institutions. These rights are in turn key enablers for indigenous peoples’ exercise of their right to development. The inter-relationship between these self-determination rights and their right to development is reinforced in UN DRIP Articles 5, 18, 20, 23 and 34, and forms the basis of their demands for self-determined development.<sup>95</sup>

It is beyond the scope of this article to address the distinct and context-specific modes for exercising the right to self-determination and its potential outcomes. Rather, the article seeks to examine the self-determination aspect that implies a choice of development options and the right to resist encroachment, particularly in the context of increased external demands for resources located in indigenous territories. This increased demand for access to their lands and resources has resulted in the requirement to conduct “meaningful consultation” with indigenous peoples – a requirement which is now regarded by many as representing a norm of customary international law.<sup>96</sup> Imai notes that despite advances in requirements under international and national legislation to consult with indigenous peoples, they continue to face some of the greatest assimilation pressures as a result of development projects that deny them access to their lands and resources.<sup>97</sup> It has therefore been argued in the context of resource extraction in indigenous peoples’ lands that mere consultation with

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government, mechanisms need to be in place to ensure that the arrangements have the free prior informed consent of the indigenous peoples concerned.

93 Imai, *op.cit.* note 11, 290.

94 *Ibid.*

95 Arts. 5 and 18 of the UN DRIP articulate the right of indigenous peoples to develop distinct indigenous decision-making institutions and to participate in decision-making “in all matters which would affect their rights” through their chosen representatives. Art. 34 also addresses the right to develop and maintain institutional structures and associated customs, practices and juridical systems. Art. 20 reaffirms the right to develop their political, economic and social systems or institutions and contextualizes this in relation to the enjoyment of the right to development, which includes being free to engage in “traditional and other economic activities”. Art. 23 expands indigenous peoples’ right to development to include “the right to determine and develop priorities and strategies for exercising their right to development”. It also envisages indigenous peoples actively participating in economic and social programmes affecting them.

96 S. James Anaya, “Indigenous Peoples’ Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issues of What Rights Indigenous Peoples Have in Lands and Resources”, 22(8) *Arizona Journal of International and Comparative Law* (2005), 7-17.

97 Imai, *op.cit.* note 11, 301

indigenous peoples, without the requirement to obtain their consent, is inadequate.<sup>98</sup> The right of indigenous peoples to say no to a proposed development is consequently seen by many as a natural extension, or a logical progression, of the established right to meaningful consultation.<sup>99</sup> In order to ensure that consultations are 'meaningful', certain procedural rights have also evolved. These require that consultations be free from manipulation and coercion, respect traditional decision-making processes, be held in sufficient time in advance of project execution with adequate information provided to enable informed decisions to be taken. Collectively, these requirements have come to be termed 'free prior informed consent' or 'FPIC'.

The right of indigenous peoples to determine and formulate their developmental priorities and strategies regarding their lands or territories and other resources is articulated in Article 32(1) of the UN DRIP. Article 32(2) then links this aspect of the right to development to the obligation of states to obtain FPIC in the context of development projects affecting these lands or resources.<sup>100</sup>

In doing so the UN DRIP highlights the indivisibility of the concepts of FPIC and self-determined development and the fact that they are, in many regards, two sides of the same coin. On one side, self-determined development embodies the right of indigenous peoples to decide their own development priorities. FPIC protects this right in the face of projects, policies or legislation that could run counter to these priorities or render them unachievable. In light of the widespread imposition of development projects in indigenous territories and the implementation of enabling policies and legislation, non-recognition of the requirement to obtain FPIC implies that communities have no determining say in the developments that occur on their own lands.<sup>101</sup>

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98 Anaya, *op.cit.* note 97, 17: "Where property rights are affected by natural resource extraction, the international norm is developing to also require actual consent by the indigenous peoples concerned". A similar argument was made by the World Commission on Dams with regard to indigenous peoples' involvement in the decision-making process. See World Commission on Dams, *Dams and Development, A New Framework for Decision Making: The Report of the World Commission on Dams* (Earthscan, London, 2000).

99 Margaret Satterthwaite and Deena Hurwitz, "The Right of Indigenous Peoples to Meaningful Consent in Extractive Industry Projects", 22 *Arizona Journal of International and Comparative Law* (2005), 1-4.

100 UN DRIP Art. 19 also requires that FPIC be obtained through indigenous peoples own representative institutions in relation to legislative or administrative measures affecting them.

101 In practice many governments "remain loath to acknowledge that indigenous consent is required", a fact which appears to be resulting in increasing number of physical confrontations between states and indigenous peoples, and leading to incarcerations, injuries and even deaths. Imai, *op.cit.* note 11, 301-302, notes that physical confrontations continue in Canada, United States, New Zealand and Australia with an aboriginal protestor shot dead by police in Canada in 2007. Similar confrontations resulting in the deaths of indigenous peoples occurred in 2009 in countries such as the Philippines, Peru and Ecuador (*op.cit.* notes 35 and 153).

Implicit in this reality is the fact that they are no longer in a position to determine their own development priorities.<sup>102</sup>

On the other side of the coin genuine FPIC is only possible if the community has been afforded the possibility of deciding its development priorities in advance. The option to consider and evaluate alternative culturally appropriate development options that are available to a community, prior to having to make any decisions with regard to proposed developments is essential to making a free and fully informed choice.<sup>103</sup> Communities therefore need to be given the space to decide their own development priorities and formulate their own development plans prior to the conduct of FPIC processes. If they have not had the opportunity to do so, then sufficient time must be afforded to them when external development projects or policies are proposed before they can be expected to give their FPIC. Uncertainty is the enemy of community development projects.<sup>104</sup> The denial of the right to FPIC consequently acts as a major inhibitor for indigenous peoples interested in investing in and developing their own territories.

As mentioned above the adoption of the UN DRIP has seen increased international attention on the impact of development projects on indigenous peoples, particularly in the extractive sector. A series of international conferences and workshops held between 2001 and 2009 addressed the relationship between indigenous peoples and the extractive sector. These meetings, which involved indigenous peoples, states, UN agencies and bodies and industry, all emphasized that development should only proceed in a manner that is consistent with the rights articulated in the UN DRIP.

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102 Indigenous communities in the Philippines have lodged complaints that the imposition of mining and other large-scale development projects in their lands is transforming their Ancestral Domain Sustainable Development and Protection Plans (ADSDPPs) from their original intent as “culturally appropriate self-determined development plans” into “externally imposed investment roadmaps designed to suit the needs of corporations”, Philippines Indigenous Peoples CERD Shadow Report, *op.cit.* note 24, 10.

103 Consultation Workshop and Dialogue on “Indigenous Peoples’ Self-Determined Development or Development with Identity”, *op.cit.* note 58, 22. At the 2008 Tivoli consultation, it was pointed out that development should be an expression of self-determination. For that, indigenous peoples’ control over “the direction and process of development” was deemed necessary, as was the principle of genuine FPIC. For FPIC to be genuine, indigenous peoples’ awareness of alternatives to the development paradigms and options being proposed in the FPIC process was considered necessary.

104 Communities are disincentivized from investing their time and resources in the development and management of their lands and resources when they are aware that large-scale development projects may be imposed on them in the future. This problem is compounded by the fact that external actors, including the state, generally place no value on the major intergenerational investments that indigenous peoples have already made in their territories. These significant investments for current and future generations are often destroyed with little or no compensation and no meaningful analysis of the long-term impacts to wellbeing. Examples in the Philippines include investments made by communities in citrus farms, vegetable farms and rice paddies that had been destroyed to make way for unwanted mining projects. See Philippines Indigenous Peoples CERD Shadow Report, *op.cit.* note 24.

The inseparability and interdependence of the right to FPIC and the right to a self-determined development was addressed at all these meetings.

Recognizing this interdependence, the 2009 UN PFII initiated and facilitated an international expert group meeting on extractive industries, indigenous peoples’ rights and corporate social responsibility<sup>105</sup> (henceforth UN PFII experts groups meeting), and pointed out that it was important that FPIC be conceived of within the context of the rights of communities to determine their own development paths. It also recommended that states should be clear “that the impacts of refusing to respect FPIC rights in one project can taint all future relationships and negotiations with Indigenous communities”. Illustrative of this were the situations in the Philippines<sup>106</sup> and Peru<sup>107</sup>,

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105 The expert group meeting was held in Manila from the 26-28 March 2009. See “Report of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples’ Rights and Corporate Social Responsibility”, 4 May 2009, UN Doc, E/C.19/2009/CRP.8, at <[http://www.un.org/esa/socdev/unpfii/en/session\\_eighth.html](http://www.un.org/esa/socdev/unpfii/en/session_eighth.html)>.

106 In the Philippines the 1997 Indigenous Peoples Rights Act (IPRA) recognizes the right of indigenous peoples to self-determination, ancestral domains, including all resources therein, and FPIC. Indigenous peoples are required to formulate their own Ancestral Domain Sustainable Development and Protection Plan (ADSDPP). These plans were envisaged as a means of providing communities with culturally appropriate self-determined development options. In practice, however, control over the funding and procedure for the formulation of these plans is reserved to a government agency responsible for upholding indigenous peoples’ rights but which lacks accountability to indigenous peoples and is perceived by many as actively promoting mining in their territories. The result is that instead of being an exercise in self-determination, there is a tendency to transform ADS DPP into investment roadmaps that facilitate extractive projects in indigenous territories. In parallel, this same government agency has implemented FPIC guidelines that go against the spirit and intent of the IPRA and provide little or no protection to indigenous peoples’ right to determine their own development path. The Indigenous Peoples Shadow Report submitted to the UN CERD documented about 20 cases where the legally recognized rights to FPIC and self-determined development had been violated. See Philippines Indigenous Peoples CERD Shadow Report, *op.cit.* note 24.

107 In Peru, indigenous peoples have started to formulate their own development alternatives to large-scale developments such as extractive projects in their lands. These alternative models embody indigenous concepts of development premised on the principle of “*buen vivir*” (good living) which is in keeping with their own philosophies, as opposed to the state-promoted concept of “*vivir bien*” (living well) which is premised on increased consumption. See *Estados plurinacionales comunitarios el buen vivir para que otros mundos sean posibles*, Coordinadora Andina de Organizaciones Indígenas (CAOI, Lima, 2008). A public forum is to be held in Lima, Peru, in January 2010 to further elaborate on these concepts. See also *El Buen Vivir desde la visión de los pueblos indígenas de los Andes*, at <<http://www.minkandina.org/index.php?news=257>>. Respect for the right to FPIC is regarded as being fundamental to facilitating a context in which communities were given the space to formulate these plans. In the absence of Peru’s recognition for their right to FPIC a number of communities held their own referenda in relation to planned mining projects based on municipal ordinances and supporting articles recognizing freedom of expression, as well as consultation and participation rights, flowing from Peru’s human rights obligations. The outcome was an overwhelming rejection of the proposed mining projects. However, the state has in turn rejected these results. As a consequence of this



presented at the 2009 indigenous peoples-organized International Conference on Extractive Industries and Indigenous Peoples<sup>108</sup> (henceforth Indigenous Conference on Extractive Industries). In both countries the failure to uphold the rights to FPIC and self-determined development has led to widespread conflicts resulting in deaths, injuries, criminalization of indigenous leaders and a climate of fear, tension and mistrust.

The Office of the High Commissioner for Human Rights (OHCHR) held a workshop in 2001 on the subject of the private sector natural resource, energy and mining companies and human rights. The report states that “the workshop affirmed the importance of economic and sustainable development for the survival and future of indigenous peoples. It also considered, in particular, that the right to development means that indigenous peoples have the right to determine their own pace of change, consistent with their own vision of development, and that this right should be respected, including the right to say ‘no’.”<sup>109</sup>

The authors concur with this position that obtaining indigenous peoples’ FPIC, in accordance with their right to self-determination and self-determined development, necessarily embodies their right to dissent. There exists an ongoing debate as to what limitations may legitimately be placed on the exercise of indigenous peoples’ right to self-determination, and in particular to the ‘veto’ aspects of its FPIC component.<sup>110</sup> In this regard the Inter-American Court has ruled that states have a duty to obtain FPIC where “large-scale development or investment projects that would have a major impact within [indigenous peoples] territory”.<sup>111</sup> The UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, has

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state refusal to accept the decisions of indigenous communities or to hold meaningful consultations with them, conflicts over extractive projects were widespread throughout the country. The events that emerged in Bagua, in which 30 people were killed following conflicts between military police and indigenous communities in the Amazon region of Peru, attest to the seriousness of the situation. See submission made to CERD by Peruvian indigenous organizations in relation to the Bagua incident and the context in which it occurred: *Observaciones al Informe Oficial del Estado Peruano*, Coordinadora Andina de Organizaciones Indígenas and Confederación Nacional de Comunidades Afectadas por la Minería, 2009; *Algunas Consideraciones Relativas al Informe Presentado al por el Gobierno de Perú al CERD*, Comisión Jurídica Para el Autodesarrollo de los Pueblos Originarios Andinos, 2009.

108 The Indigenous Peoples Conference was held in Manila from 23-25 March 2009.

109 OHCHR, Report of the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights, E/CN.4/Sub.2/AC.4/2002/3, 31.

110 For an initial discussion on the right to say ‘no’ and the veto element of FPIC, see Jeremie Gilbert and Cathal Doyle, “A New Dawn Over the Land: Shedding Light on Collective Ownership and Consent”, in Stephen Allen and Alexandra Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford, forthcoming in June 2010).

111 Inter-American Court of Human Rights *Case of the Saramaka People v Suriname* Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs) Inter-Am. Ct. H.R., (Ser. C) No. 172 (2007), para. 134

also addressed this issue. While emphasizing the need to strive for mutual consent based on good-faith negotiations between indigenous peoples and the state, he is of the opinion that in certain contexts “a significant, direct impact on indigenous peoples’ lives or territories [...] may harden into a prohibition of the measure or project in the absence of indigenous consent”.<sup>112</sup>

Indigenous communities may already have, or wish to develop, alternative development plans and priorities for their own territories that are based on their own conceptions of wellbeing. These may be in keeping with their cultural characteristics, involve protecting their sacred areas, or be aimed at avoiding negative impacts on traditional livelihoods, health, environment, their lands and resources, and protecting the rights and interests of future generations to sustainable and culturally appropriate development. For indigenous peoples to be in a position to realize self-determined development within their territories they must be able to preclude externally imposed development projects that run contrary to these plans and priorities. While the article will not delve further into the issue at this point, it is interesting to note that in making his arguments in relation to development as freedom, Sen approaches the issue of dissent in relation to development as follows:

Within narrower views of development (in terms of say, GNP growth or industrialization) it is *often asked whether freedom of political participation or dissent is or is not ‘conducive to development’*. In light of the foundational view of development as freedom, this question would seem to be defectively formulated, since it misses the crucial understanding that political participation and dissent are constitutive parts of development itself[...]. the relevance of the basic deprivation of basic political freedoms or civil rights, for an adequate understanding of development, does not have to be established through their indirect contribution to other features of development such as the growth of GNP or the promotion of industrialization). These features are part and parcel of enriching the process of development.<sup>113</sup>

As with the right of any society or nation to dissent to proposed development policies impacting on them through the democratic process available, the right of indigenous peoples to dissent to proposed developments impacting on their territories should not be viewed as an obstacle to development, but as an intrinsic part of the development

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112 The 2009 annual report of UN Special Rapporteur James Anaya addresses the subject of “veto power”, suggesting that this was not the appropriate lens through which to view the issue of FPIC. However, the report does not suggest that, if having followed good faith consultations indigenous peoples decide not to give their consent to a project in their territories (for example on the basis of its impacts to their physical or cultural wellbeing), then that project should be imposed on them against their will. See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, A/HRC/12/34, 15 July 2009, paras. 46–49.

113 Sen, *op.cit.* note 18, 36–37, emphasis added. Sen also points out that “the significance of the instrumental role of political freedoms as a means to development does not in any way reduce the evaluative importance of freedom as an end to development”.

process and an end objective of development. The denial of this right to dissent is the denial of development itself.

*B. Natural Resource Rights and Self-Determined Development*

A related topic, that has been receiving increased attention in international fora addressing the subject of indigenous peoples' right to development and the implications of the adoption of the UN DRIP on the extractive sector, is the question of indigenous peoples' rights to natural resources. Article 26 of the UN DRIP recognizes indigenous peoples' rights to their lands and resources "which they have traditionally owned, occupied or otherwise used or acquired". This represents a significant evolution from the right to resources recognized under ILO Convention 169, Article 15(1), which will be addressed below. As discussed earlier the effect of the UN DRIP as an interpretative source for national and international law remains to be seen. However, the UN DRIP's recognition of resource ownership reflects a more meaningful interpretation of indigenous peoples' land and resource rights as it:

- 1) is in accordance with their holistic world views and philosophies, which generally do not differentiate between ownership of resources that are above the earth's surface and those that are below it;
- 2) reflects the reality that many indigenous communities have themselves made use of subsoil resources in the past and, as recognized under the doctrine of aboriginal title, in accordance with their indigenous laws and practices have ownership of these resources<sup>114</sup>;
- 3) is consistent with the evolving recognition of indigenous peoples' rights in international law as reflected in recent interpretation of the Inter-American Court on Human Rights of indigenous peoples property rights when it stated that [...] *the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land*" and "that the natural resources found on and within indigenous and tribal people's territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life";<sup>115</sup>
- 4) is consistent with Article 1(2) of the UN Declaration on the Right to Development which provides that the right to development "implies the full realization of the right of peoples to self-determination which includes...the exercise of their inalienable right to full sovereignty over all their natural wealth and resources"; and

114 The Canadian Supreme Court, *Delgamuukw v. British Columbia* 3 S.C.R. 1010, 1997, also stated that "aboriginal title also encompasses mineral rights". In other contexts, communities may have decided for cultural or spiritual reasons not to mine or use resources located in their territories but still to maintain ownership over these resource under their customary laws, something often evidenced by their denial of permission to others to exploit these resources.

115 Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs) Inter-Am. Ct. H.R., (Ser. C) No. 172 (2007), para. 122, emphasis added.

- 5) is in keeping with developments pertaining to the recognition of the use and control of other resources located in indigenous lands such as interpretations of Article 10(c) of the Convention on Biological Diversity.<sup>116</sup>

Indigenous peoples’ right to their resources and the relationship between this right and self-determined development is further affirmed in Article 25 and 29 of the UN DRIP.<sup>117</sup> Commenting on indigenous peoples’ right to development, Daes, author of the report addressing indigenous peoples’ right to permanent sovereignty over their natural resources,<sup>118</sup> notes that it is important to address the issue of dispossession and the “billions of dollars of resources that have been extracted from indigenous peoples’ territories”.<sup>119</sup> Articles 20 and 32(3) address the related issue of redress where indigenous peoples have been deprived of their resources and their means of subsistence and development. Read together with Article 3, on the right to self-determination, they reflect the principles outlined in common Article 1(2) on the right to self-determination of the two international human rights covenants.<sup>120</sup>

As referred to above, the UN DRIP represents an evolution from ILO Convention 169 with regard to the recognition of ownership rights to resources. Article 15(1) of ILO Convention 169 refers to a right to participate in the use of resources and does not recognize a right to ownership. It states that “[t]he rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.”

Likewise Article 15(2) does not make explicit reference to indigenous peoples’ resource ownership rights. However, the recognition of indigenous peoples’ owner-

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116 Convention of Biological Diversity 1997, Art. 10(c), protects the “customary use of biological resources in accordance with traditional cultural practices” and has been interpreted as requiring the recognition of indigenous peoples control over natural resources that lay on their lands.

117 UN DRIP, Art. 25, recognizes the special spiritual and intergenerational aspects of the relationship indigenous peoples have with their resources. Art. 29 requirement that the “productive capacity of their lands or territories and resources” be protected and conserved has important implications for the enjoyment of their right to development. Their right to resources is implicit in Art. 20 when it recognizes indigenous peoples’ rights to “traditional and other economic activities” and their entitlement to “just and fair redress” where they are deprived of “their means of subsistence and development”. Art. 32(3) also addresses the need for redress in the event of indigenous peoples’ resources being exploited in the context of development projects. Combined, the aforementioned articles recognize the need to protect indigenous peoples’ means of subsistence and the fact that their lands and resources are fundamental elements of such subsistence.

118 Erica-Irene Daes, Report on Indigenous Peoples’ Permanent Sovereignty over Natural Resources E/CN.4/Sub.2/2004/30/Add.1.

119 Daes, *op.cit.* note 8, 103.

120 This article is which is referenced in the declaration’s preamble states that: “All peoples may, for their own ends, freely dispose of their natural wealth and resources [...] based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

ship rights is implicit in those cases where states do not retain ownership of subsurface resources or rights. This interpretation is in keeping with ILO Recommendation 104, which is based on a non-discriminative approach to resource ownership and recommends that indigenous populations “receive the same treatment as other members of the national population in relation to the ownership of underground wealth”.<sup>121</sup> Article 15(2) which recognizes the right to benefit from the exploitation of these resources, states that:

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

An examination of the debates surrounding the drafting of ILO 169 sheds some light on the background to this more conservative and, from the perspective of the many impacted indigenous peoples, increasingly inadequate, position of the convention *vis-à-vis* their rights to resources in their lands.

This issue of the control over natural resources was the subject of significant debates during the revision of ILO Convention 107. The Meeting of Experts noted that serious damage to indigenous peoples’ lifestyle could occur when states retain exclusive control over the rights to subsoil, mineral and other natural resources.<sup>122</sup> However, a number of states insisted that the ownership of natural resources should remain exclusively with states, pointing out that in most national legislation these resources could only be granted to private individuals on a concessionary basis.<sup>123</sup> During the debates leading to the adoption of ILO 169, the employer’s group expressed its concerns over the eventual recognition of indigenous peoples’ rights to subsoil resources and fears that this could lead to a right of veto over exploration and exploitation of those resources, thereby affecting national interests.<sup>124</sup> In response, a representative of the Indian Council of South America highlighted the discriminatory precepts upon which these state claims to subsoil resources were based, stating “with regard to natural resources, we believe that it is essential to include explicit reference in the revised Convention to both surface and subsurface resources. The claims of States to exclusive ownership of these resources have often been based on premises that ignored the pre-existing rights of indigenous peoples.”<sup>125</sup>

121 ILO Recommendation 104, 40th Session, 5 June 1957.

122 Report VI(1), 75th Session, Geneva 1988, 58.

123 See especially the debates of the Working Party, ILO, Provisional Record 25, 76th Session, Geneva, 1988.

124 See ILO, Provisional Record 36, 75th Session, Geneva 1988, 19.

125 *Ibid.*, 23.

However, given the fact that indigenous peoples had limited input and negotiating power in the drafting process, the position of the employers and those states opposing the explicit recognition of indigenous peoples' rights to resources dominated. The argument made by the employers that exploitation of natural resources is in the national interest is strongly contested on a range of grounds. First, employers in the extractive industry are entities with a vested interest in maintaining the status quo *vis-à-vis* their access to resources. Second, the argument that recognizing indigenous peoples' rights to their resources and the associated right to decide what happens to these resources would negatively impact on the national interest is not substantiated in fact. Experience shows that where veto rights are recognized, such as in the Northern Territories of Australia, indigenous peoples have given their consent subject to certain conditions and mining has proceeded.<sup>126</sup> Experience also shows that where indigenous peoples' ownership rights to their resources are recognized, such as in the South African cases discussed below, mining has also been allowed to proceed.<sup>127</sup> However, the concept of development must be expanded to embrace a meaning whereby some places may remain "under-developed" in the conventional sense of the term.<sup>128</sup> In addition, the blanket assumption that mining is always in the national interest is highly questionable on economic and other grounds.<sup>129</sup> Nor does the assumption address the potentially major and long-term impact to livelihoods of indigenous and non-indige-

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126 For an analysis of some agreements negotiated under the Aboriginal Land Rights (Northern Territory) Act 1976 which provides indigenous peoples with a veto right in relation to mining projects in their territories see Ciaran O'Faircheallaigh, "Mineral Development Agreements Negotiated by Aboriginal Communities in the 1990s", Centre for Aboriginal Economic Policy Research, CAEPR Discussion Paper No. 85/1995.

127 The Richtersveld Community, the Royal Bafokeng Nation and the Bakubung Community are examples of cases where agreements were reached with mining companies and indigenous peoples in which indigenous ownership stakes were in excess of 20%.

128 Daes, *op.cit.* note 8, 60, notes that "[n]early every ecological change therefore has some religious and cultural significance for indigenous peoples. Respect for religion and culture requires major changes in national laws governing the use of land and natural resources, as well as accepting that a large part of the national territory may remain 'under developed' for the foreseeable future."

129 International empirical studies that have questioned the macroeconomic benefits of mining include Jeffrey D. Sachs and Andrew M. Warner, *Natural Resource Abundance and Economic Growth* (Harvard University. Harvard Institute for International Development, Cambridge, MA, 1997); Jeffrey D. Sachs and Andrew M. Warner, "The Curse of Natural Resources", 45 *European Economic Review* (2001), 827-838; Richard M. Auty, *Resource Abundance and Economic Development: Improving the Performance of Resource-Rich Countries*, Research for Action 44 (UNU/WIDER, Helsinki, 1998); Thomas M. Power, "Digging to Development: A Historical Look at Mining and Economic Development, An Oxfam America Report" (Oxfam America, Boston, 2002). See also Roger Moody, *Rocks and Hard Places: The Globalization of Mining* (Zed Books, London, 2007), 43-68; Antonio Tujan and Rosario Bella Guzman, *Globalizing Philippine Mining* (IBON, Manila, 2002). *Extractive Industry Review: Striking a Better Balance*, The World Bank Group and Extractive Industries, December 2003. The question of whether or not mining is in the national interest is particularly contentious in states with weak governance and high levels of corruption, where there is a high risk of conflict or conflicts are already ongoing, and



nous peoples in other sectors such as agriculture, fishing and tourism, or the fact that the maintenance of indigenous cultures is also an important element of the national interest.<sup>130</sup> The UN DRIP, by recognizing indigenous peoples' resource ownership rights, provides a first step towards addressing discriminatory colonial doctrines that continue to inform national legislation—and the arguments of legislatures—in many countries and which impact negatively on indigenous peoples' self-determined development.

This issue was raised at the International Conference of Indigenous Peoples where it was pointed out that in many countries, colonial doctrines such as the Regalian doctrine, under which the state claims ownership of all subsoil resources, undermine indigenous peoples "inherent and indivisible" rights.<sup>131</sup> It was also noted in the UN PFII expert groups meeting that indigenous peoples' rights to resources was an important subject to be addressed in the context of operationalizing their right to self-determination.<sup>132</sup> The topic of rights to resources was one of the primary themes discussed in the 2008 UN OHCHR-organized international workshop on "Natural Resource Companies, Indigenous Peoples and Human Rights: Setting A Framework for Consultation, Benefit-Sharing and Dispute Resolution".<sup>133</sup> That workshop addressed the land restitution case of the Richtersveld<sup>134</sup> community in South Africa. The South African Constitutional Court held in 2003 that the community had a "right to land", which it referred to as "indigenous law ownership". It required restitution of the right to exclusive beneficial occupation and use of the lands including its minerals and precious stones.<sup>135</sup> This recognition of the community's right to their resources was described as having pervaded all subsequent discussions and negotiations<sup>136</sup> resulting in significant benefits to the community which acquired a 49% equity stake in the mining company.

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where targeted areas are prone to geographical hazards or are suffering from increasingly unstable climatic conditions.

130 The long-term benefits of maintaining indigenous cultures and the impacts of widespread development projects on them are not considered in traditional economic concepts of national interest.

131 The 2009 Manila Declaration, *op.cit.* note 33, called for these rights denying doctrines to be abandoned.

132 This point was raised by Windel Bolinget, Secretary General of Cordillera Peoples Alliance, Philippines. Notes of expert group meeting on file with authors.

133 OHCHR, "International Workshop on Natural Resource Companies, Indigenous Peoples and Human Rights: Setting a Framework for Consultation, Benefit-Sharing and Dispute Resolution", held in Moscow, 3-4 December 2008. See "International Workshop on Natural Resource Companies, Indigenous Peoples and Human Rights: Setting a Framework for Consultation, Benefit-Sharing and Dispute Resolution", Moscow, 3-4 December 2008, Report prepared by the Office of the United Nations High Commissioner for Human Rights.

134 Tung M. Chan, "The Richtersveld Challenge: South Africa Finally Adopts Aboriginal Title", Robert K. Hitchcock and Diana Vinding (eds.), *Indigenous Peoples' Rights in Southern Africa* (IWGIA, Copenhagen, 2004), 114-133.

135 *Richtersveld Community v. Alexkor*, 2003 (6) SA 104 (SCA) at paras. 29 and 111.

136 Other issues that arose in the ruling and discussion of the case included the role of customary law, representation of communities via their customary structures, timeframes for

Similar examples were provided in relation to other indigenous communities in South Africa where ownership rights to resources were recognized.<sup>137</sup> All of these projects were financially viable despite the significant ownership stakes held by the indigenous peoples. It was suggested that this recognition of rights to resources was necessary in order to build trust and ensure that parties entered into negotiations as equals, and that it simply reflected the reality that indigenous communities living on their communal lands constitute more than just stakeholders with an interest in their environment.<sup>138</sup> Recognition of these time immemorial ownership rights is necessary if a vision of development based on equity is to be transformed into a reality.

## V. CONCLUSIONS

Histories of unwanted and destructive projects in indigenous territories have resulted in development being associated with aggression, giving rise to what indigenous peoples aptly refer to as 'development aggression'. Despite the emergence of 'sustainable development' and 'human development' discourses, the current wave of globalization has served to perpetuate the pattern of development aggression. Indigenous peoples who have long been the victims of this model of imposed development are now demanding that they be the ones to determine their own development priorities and control development on their own terms within their territories. In so doing, they are challenging the dominant development paradigm and demanding that they become actors in and contributors to development rather than subjects or victims of it. These demands are based on their right to self-determination and the associated development paradigm is increasingly referred to as 'self-determined development'. Realization of indigenous peoples' self-determined development is contingent on respect for their rights, governance structures and philosophies, all of which are premised on their core values of reciprocity, equity, solidarity and interconnectedness.<sup>139</sup> For globalization and self-determined development to coexist, indigenous peoples hold that the former must

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decision-making and intergenerational aspect of decisions to be taken by, and any agreements reached, with communities.

137 See *op.cit.* note 127.

138 Points made by former attorney for the community, Henk Smith, of Legal Resource Centre, South Africa, during discussions of the case at the Moscow workshop. Notes of meeting on file with authors.

139 The 2008 Tivoli consultation, *op.cit.* note 57, 18-19, indigenous peoples, representatives of UN agencies and experts in the field of indigenous peoples' rights addressed the subject of "self-determined development" or "development with identity". The consultation identified a number of elements that are embodied in these concepts. The following is an attempt to broadly group some of these elements into the following categories rights, philosophies and practices, governance and methods for realization:

- Rights: ensure respect for rights to self-determination, lands, territories and resources; participation and free, prior and informed consent, equality, non-discrimination, political participation and autonomy, culture and identity, culturally appropriate services and redress.
- Philosophies and practices: protect and strengthen indigenous world views, customary laws and traditional knowledge; holistic management of territories and natural

be infused with the values of the latter. The UN DRIP is seen as the enabling framework in which this can occur, with self-determined development having emerged as one of the most significant objectives of its implementation.

Indigenous peoples are actively pursuing self-determined development paths at the local, national and international levels.<sup>140</sup> While some examples of positive outcomes exist, significant obstacles remain to realizing self-determined development. This is particularly true in the context of major development projects which seek to exploit resources located in indigenous territories. The transformation of the development process into one that is compatible with indigenous peoples' right to self-determination will require actions on the part of governments, international agencies, financial institutions, UN agencies, NGOs and, above all, indigenous peoples themselves.

In recognition of indigenous peoples' right to self-determination governments must ensure their full and effective participation at all stages of national development policy planning, formulation and implementation that impacts on them.<sup>141</sup> National and local governments should respect the self-determined development plans produced by indigenous peoples and provide the necessary financial and technical assistance for their realization—the objective should be to facilitate culturally appropriate

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resources and ensure use for future generations. Promote indigenous values of reciprocity, equity, solidarity and interconnectedness.

- Governance: respect and enhance indigenous peoples' cultural institutions, political governance and justice systems, autonomous regional governments or other self-governing structures.
- Methods for realization: developing indigenous concepts wellbeing and diversity and associated indicators; revitalizing cultural traditions and customs. Promoting participation in political governance, legislative structures at all levels; providing options for indigenous peoples to balance subsistence, intercultural and market economy; reinforcing equitable traditional livelihoods; ensuring full involvement of indigenous peoples in all phases of development programmes, policies or projects.

140 Examples of UN supported initiatives include IFAD's support for self-determined development projects and its adoption of a policy on indigenous peoples which incorporates the principle of FPIC. See Victoria Tauli-Corpuz (ed.), *Good Practices on Indigenous Peoples' Development* (Tebtebba and UN Permanent Forum on Indigenous Peoples Issues, Baguio and New York, 2006) which provides examples of IFAD funded projects in India, Brazil, Peru and Bolivia that have attempted to incorporate the principles of self-determined development. Dialogues at community, regional and global levels facilitated as part of the UNDP's Regional Programme on Indigenous Peoples (RIPP) have also been supportive of the principles underlying self-determined development. Indigenous communities in a number of countries have, to varying degrees of success, in recent years formulated their own development plans such as Planes de Vida in Columbia and Ancestral Domain Sustainable Development and Protection Plans in the Philippines.

141 The UN Special Rapporteur on indigenous peoples' issues has suggested that this duty to consult "applies whenever a State decision may affect indigenous peoples in ways not felt by others in society", 2009 Report of UN Special Rapporteur on indigenous peoples, *op.cit.* note 112, para. 43. An example could be indigenous peoples' participation in the realization of the MDGs objectives or in the formulation of mining policies or legislation that impact on their territories.

development models that emanate from the community itself, rather than to seek to impose externally designed investment roadmaps. For this to be achieved indigenous peoples' involvement in the formulation of guidelines in relation to self-determined development plans and FPIC consultation processes must be guaranteed. Oversight mechanisms that are accountable to, and representative of, indigenous peoples have to be established to ensure that consultation and consent seeking processes are meaningful. The availability of legally binding grievance mechanisms in host states should be complemented by extraterritorial regulation in the home state of transnational corporations, providing indigenous peoples with access to alternative legal remedies where necessary. Ratification of ILO Convention 169 would also provide states and indigenous peoples with an additional avenue for resolution of disputes that arise in relation to the operationalization of self-determined development.

Corporations involved in pursuing projects in indigenous territories should adopt formal policies that respect indigenous peoples' self determination rights as well as their rights to their lands and resources.<sup>142</sup> These policies should be applicable regardless of the legislative framework in place in the host state. Similarly UN specialized agencies, including the World Bank Group, as well as international financial institutions and NGOs should revise their policies to comply with the UNDRIP, requiring indigenous peoples' FPIC for the conduct or funding of projects. As UN country teams incorporate the UNDG guidelines on indigenous peoples into their operations, indigenous peoples' self-determined development plans should become important input into UN Common Country Assessments and UN Development Assistance Frameworks.<sup>143</sup>

At the local level, indigenous peoples face a variety of context-specific challenges in their efforts to achieve self-determined development. The following suggestions may therefore not be relevant in all contexts. Increasing levels of encroachment into their lands require indigenous communities to be proactive if they wish to avoid assimilation and loss of control over their resources. The formulation of community self-determined development plans which reflect their long-term aspirations may in some cases assist in protecting communities when faced with these external claims on their resources and lands. Another activity which may prove to be of some assistance to communities in regulating access to their knowledge and resources is the formulation of community protocols.<sup>144</sup> These protocols are developed by communities fol-

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142 The endorsement of the UN DRIP in corporate policies and incorporation of the principle of FPIC into their practices would represent an important step forward in this regard.

143 CCAs are the instruments used by the UN system to analyse the national development situations and identify key development issues while DAFs are the common strategic frameworks for the country level operational activities of the UN system. See <<http://www.undg.org/?P=232>>.

144 Kabir Bavikatte and Harry Jonas (eds.), *Bio-Cultural Community Protocols: A Community Approach to Ensuring the Integrity of Environmental Law and Policy* (UNEP South Africa 2009), at <[http://naturaljustice.org.za/images/stories/natural\\_justice/nj-a4bcp-book-pdf%5B1%5Dfinal%20for%20circulation.pdf](http://naturaljustice.org.za/images/stories/natural_justice/nj-a4bcp-book-pdf%5B1%5Dfinal%20for%20circulation.pdf)>, 9. These protocols, and in particular their FPIC component, may become increasingly important in the context of negotiations in relation to global initiatives such as United Nations Collaborative Programme on Reduc-

lowing internal consultative processes held in accordance with their own traditional practices. They specify the terms and conditions, including FPIC protocols, that communities wish to use to regulate access to their resources. The formulation of these protocols can act as a catalyst for reviewing existing community development plans or preparing new ones that reflect the community's development priorities and aspirations. Formulating such plans and protocols may also provide communities with the opportunity to address issues community members may have with the transparency or representativeness of their institutions.<sup>145</sup> Governments need to provide the necessary time and space for communities to formalize these protocols, develop sustainable development plans and, where the community deems it necessary, to strengthen or restructure their institutions.

At the international level, indigenous peoples and the UN mechanisms with specific mandates regarding their human rights are currently collaborating to outline the elements of self-determined development and elaborate plans for its operationalization. Consultations have been held to outline its contours, indicators are being developed to monitor its implementation, and thematic studies are being conducted in relation to its realization.<sup>146</sup> Indigenous representatives and communities are also addressing it in their submissions to UN treaty monitoring bodies, engagements with UN agencies and funds, in discussions in relation to corporate responsibility, and with states in the context of the debate on sustainable development.<sup>147</sup> The focus on self-determined development by indigenous peoples is expected to increase in the coming years. The upcoming 2010 session of the UN PFII will address the theme "Indigenous Peoples: Development with Culture and Identity", while the 2010 session of the UN Experts Mechanism on the Rights of Indigenous Peoples will address the right to participation in decision-making.<sup>148</sup> In driving these initiatives indigenous peoples are redefining

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ing Emissions from Deforestation and Forest Degradation which will impact directly on indigenous communities.

145 For a discussion on the relationship between gender and indigenous self-determination see Val Napoleon, "Aboriginal Discourse: Gender, Identity, and Community", in Benjamin J. Richardson, Shin Imai and Kent McNeil (eds.), *Indigenous Peoples and the Law* (Hart Publishing, Oxford, 2009), 233; see also Imai, *op.cit.* note 11, 307-310, for a discussion on indigenous representation and the role of women in indigenous self-determination.

146 The 2009 Report of the UN Special Rapporteur, James Anaya, *op.cit.* note 112, addressed the state duty to consult. The 2010 of Experts Mechanism on the Rights of Indigenous Peoples will address the right to participation in decision-making. Cooperation between these two human rights mechanisms and the UN PFII is addressed in the Addendum 7 to the report of the UN Special Rapporteur, UN Doc. A/HRC/12/34/Add.7.

147 Philippines Indigenous Peoples CERD Shadow Report, *op.cit.* note 24, 32-52, see also Tauli-Corpuz, *op.cit.* note 36. The Report of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social responsibility which addresses self-determined development will be provided as input to the 2010 Conference on Sustainable Development.

148 These initiatives should provide the potential to synthesize those aspects of sustainable development, human development and the HRBA to development that are consistent with their self-determined development objectives, and to identify challenges faced by

the context in which the development debate is being played out. This is in and of itself a necessary step towards the realization of self-determined development. Their ability to ensure the meaningful engagement of states, the UN system and private actors in this debate will be an important determinant of whether or not self-determined development can be transformed into a paradigm that empowers indigenous peoples throughout the world.

While progress has been, and continues to be, made in relation to indigenous peoples' self-determined development, past experience shows that powerful vested political and economic interests, together with the inbuilt rigidities in the existing economic system, will act as major obstacles to its realization. Engagement in the development debate and the use of national and international legal mechanisms is necessary but alone it will not be sufficient to shift the dominant development paradigm towards a self-determined development one.<sup>149</sup> It took mass mobilization and marches of ordinary citizens throughout the world to put the need for reform of the globalization model on the agenda of developed states.<sup>150</sup> The increasingly frequent mobilizations of indigenous peoples to prevent encroachments into their territories are similarly applying pressure on both developed and developing states, as well as on corporations, to adopt alternative methods of engaging with them.<sup>151</sup> Unfortunately, in far too many cases, meaningful engagement on the part of states and corporations only occurs after manifestations have been suppressed through the use of force resulting in injuries, deaths and the criminalization of indigenous leaders.<sup>152</sup>

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indigenous communities as well as successes realized in their pursuit of self-determined development paths.

- 149 Indicative of this is the fact that where developing states have made attempts to legislate in line with indigenous peoples' rights, they have found themselves constrained from doing so by legal challenges from transnational corporations claiming breaches of existing trade and/or investment agreements. *Op.cit.* note 26
- 150 Stiglitz, *op.cit.* note 5, 9, noted that "it is the trade unionists, students, environmentalists—ordinary citizens—marching on the streets of Prague, Seattle, Washington, and Genoa who have put the need for reform on the agenda of the developed world".
- 151 Globalization, through technologies such as the internet and mobile phones, has facilitated the interconnecting of indigenous peoples the world over. In so doing, it has facilitated collaboration in information access and sharing, enabled the formation of alliances and networks of indigenous peoples and their support groups, allowed for the development of joint strategies for addressing common issues, and provided the means to raise these issues to the attention of diverse audiences, including governments, investors, shareholders and the general public.
- 152 Examples include cases in 2009 in Peru and Ecuador where deaths resulted from state use of force to address indigenous peoples' protests. In Ecuador this led to negotiations involving 130 indigenous leaders and government ministers that appear to have met some of the demands of indigenous communities. See <[http://ci.forolacfr.org/index.php?/news-room/nota/indigenas\\_y\\_gobierno\\_logran\\_seis\\_acuerdos/](http://ci.forolacfr.org/index.php?/news-room/nota/indigenas_y_gobierno_logran_seis_acuerdos/)>. In Peru, the UN Special Rapporteur on Indigenous Peoples Issues recommended an independent investigation that ensured international involvement be conducted. However, to date the Peruvian government has not acted on this recommendation. See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James



Turning to the more positive dimensions of the interaction of self-determined development and globalization, it would be remiss not to address the major contribution that indigenous peoples can make to development at the national and global levels. As keepers of traditional knowledge, stewards of much of the earth's remaining natural resources, and holders of world views and philosophies predating nation states, the more than 350 million indigenous people worldwide have enormous potential to enrich the physical, cultural and spiritual wellbeing of the global community. Given the opportunity to develop on their own terms and in accordance with their values of reciprocity, equity, solidarity and interconnectedness indigenous peoples could generate a truly sustainable, intergenerational, equitable and consensus-driven, rights-based development model from which a global society facing major challenges such as climate change may have much to learn.

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Anaya, Additional Observations on the situation of the Indigenous People of the Amazon and the Events of 5 June and Subsequent Days in the Provinces of Bagua and Utcubamba, Peru, UN Doc. A/HRC/12/34/Add.8, 18 August 2009, 33.